Affirmed and Opinion Filed December 21, 2016

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-16-00218-CV

WINDELL GILBERT, Appellant
V.
CHERISH FITZ, Appellee

On Appeal from the County Court at Law No. 4
Dallas County, Texas
Trial Court Cause No. CC-15-01125-D

MEMORANDUM OPINION

Before Justices Fillmore, Brown, and Richter[1]
Opinion by Justice Fillmore

Windell Gilbert and Cherish Fitz were involved in a traffic accident on July 22, 2014. Karla Madra owned the car Fitz was driving, and the Government Employees Insurance Company (GEICO) had issued a liability policy to Madra covering operation of the car. On July 30, 2014, Amanda Alvarez, an adjuster employed by GEICO, and Gilbert entered into a verbal settlement agreement of Gilbert's bodily injury claims based on the accident.

Gilbert subsequently sued Fitz seeking to recover for injuries he allegedly suffered in the accident. Fitz filed a counterclaim asserting Gilbert had breached the settlement agreement. The trial court granted Fitz's motion for partial summary judgment on her counterclaim and signed a final judgment ordering that Gilbert specifically perform the settlement agreement, dismissing

[1] The Hon. Martin Richter, Justice, Assigned.

Gilbert's claims, and awarding Fitz $10,000 in attorneys' fees. Gilbert appeals the trial court's judgment asserting, in two issues, that the summary judgment evidence failed to conclusively establish there was a meeting of the minds on the terms of the settlement agreement, and there was a genuine issue of fact as to whether GEICO materially breached or repudiated the agreement. We affirm the trial court's judgment.

Background

On July 22, 2014, the car Fitz was driving "rear-ended" Gilbert's car. Gilbert was transported by ambulance to the hospital where he was told he had a neck contusion, fractured wrist, and fractured rib cage. Gilbert was released from the hospital that same day.

At 5:02 a.m. on July 30, 2014, GEICO's "Atlas System" generated a letter to Gilbert for Alvarez's signature enclosing a HIPAA Compliant Authorization form and an Authorization to Obtain Leave and Salary Information form. The letter informed Gilbert that:

> The HIPAA Compliant Authorization form allows physicians who are treating you to provide us with supporting documentation describing your medical care and how those services relate to your injury.

The letter notified Gilbert that, "As soon as we receive these forms, we can begin to review your medical claim."

At 11:00 a.m. on that same day, Alvarez called Gilbert. Alvarez's notes from the conversation indicate Gilbert confirmed he "feels ok now" and had medical expenses only from the date of the accident. The following exchange, which was recorded with Gilbert's permission, then took place:

> Alvarez: The purpose of this recorded conversation is to make a record of a bodily injury settlement of a claim by Windell Gilbert for bodily injury resulting from an automobile accident on July the 22nd, 2014 at Highway . . . at Interstate 20 West in Cedar Hill, Texas involving an automobile driven by Cherish Nicole Fitz (sic) and insured under the name of Karla Madra (sic), is this correct?
>
> Gilbert: Yes.

Alvarez: We have agreed to settle your bodily injury claims of um . . . I'm sorry uh, a total settlement amount that will include the reasonable and related injury medical expenses that were actually incurred on July the 22nd, 2014 plus $500.00. Um, let's see . . . let's see. Settling this bodily injury claims means GEICO Indemnity Company will pay to you on behalf of Sh. . . uh, Cherish Nicole Fitz and Karla Madra, GEICO Indemnity Company, and with your acceptance, you will give up any and all rights to file a lawsuit or make any further claim for bodily injury against Cherish Nicole Fitz and Karla Madra for the accident of July 22, 2014, so you agree to accept $500.00 plus any reasonable and related medical expenses incurred on July the 22nd, 2014 um, that does not exceed the remaining liability policy limits of policy number 4167411505 um . . .

Gilbert: If. . .if. . .if. . .

Alvarez: What?

Gilbert: Are you finished?

Alvarez: No.

Gilbert: Okay.

Alvarez: Uh, (inaudible - mumbling) full and final settlement of your bodily injury claim against Cherish Nicole Fitz and Karla Madra for the accident of July the 22nd, 2014 and release them and GEICO Indemnity Company from any further liability?

Gilbert: (No audible response).

Alvarez: Your response is needed, yes or no.

Gilbert: Yes.

Alvarez: Yes, you're agreeing to indemnify and hold harmless Cherish Nicole Fitz and Karla Madra and GEICO Indemnity Company from any and all claims related to your injury, illness or disease related to the accident of July the 22nd, 2014, is this correct?

Gilbert: Yes.

Alvarez: Is it is your desire to settle this claim as discussed and release Cherish Nicole Fitz and Karla Madra and GEICO Indemnity Company?

Gilbert: Yes.

Alvarez's notes indicate she advised Gilbert a check would issue that day and that he needed to send her his medical bills. Alvarez estimated that Gilbert's medical bills from the date of the accident would be between $5,000 and $8,000.[2] Alvarez sent a letter to Madra informing her that GEICO had settled Gilbert's bodily injury claims.

Gilbert expected the agreement would be reduced to writing and sent to him. Instead, on July 31, 2014, GEICO sent Gilbert a check for $500 that contained the notation it was in payment of "Bodily Injury Coverage" and was "full & final settlement of any & all claims including liens known or unknown." Gilbert signed a representation agreement with Manuel Green, an attorney with the Rad Law Firm, on August 4, 2014. The following day, Gilbert contacted Green's assistant, Javier Gonzalez, and told Gonzalez that he had received the $500 check from GEICO. At Green's direction, Gonzalez advised Gilbert not to sign or endorse the check and to begin treatment at Procare Injury and Rehab Centers. Gilbert stated that he understood the release language on the check meant GEICO had changed the terms of the settlement, and he decided to pursue his bodily injury claim against Fitz. He sought additional medical treatment on a "lien basis" because he was still in pain from the accident.

On August 5, 2014, Green sent a letter to Alvarez stating that Gilbert had retained the Rad Law Firm to handle any and all claims arising out of the accident. Alvarez responded to the letter on August 6, 2014, informing the Rad Law Firm that "the bodily injury claim for Windell Gilbert has been settled and a verbal release is on file." Alvarez also called Gonzalez, advised him that Gilbert's bodily injury claim had been settled, and emailed him the "verbal release." Gonzalez told Alvarez on August 22, 2014, that Gilbert was returning the check to GEICO and would continue to seek medical care. Alvarez again informed Gonzalez that the bodily injury

[2] Gilbert's bills for the medical treatment he received on the date of the accident were provided to GEICO by Gilbert's counsel months later and totaled $4,806.75.

claim had been settled. Gonzalez responded that a settlement could not be effective in the absence of a written agreement, and the Rad Law Firm would send a demand letter to GEICO.

The Rad Law Firm referred the case to the Benton Law Firm. "Jeff" from the Benton Law Firm called Alvarez on October 2, 2014, and stated that a "verbal release will not stand up," and he would file suit if GEICO did not settle Gilbert's bodily injury claim. Alvarez spoke with the Benton Law Firm again on December 8, 2014, and was advised Gilbert had completed treatment and the law firm was gathering his medical bills and records and preparing a demand. Between August and October 2014, Gilbert incurred over $15,000 in medical expenses.

Gilbert sued Fitz on March 4, 2015, alleging that her negligence in causing the accident had injured him. Fitz filed a counterclaim for breach of contract and sought specific performance of the contract, dismissal of Gilbert's claim, and attorneys' fees. Fitz moved for summary judgment on her counterclaim on grounds the oral settlement agreement was a valid and enforceable contract. Gilbert responded to the motion arguing the summary judgment evidence failed to conclusively establish there had been a meeting of the minds on the terms of the settlement agreement and there was a genuine issue of fact as to whether GEICO materially breached or repudiated the agreement. The trial court granted Fitz's motion for partial summary judgment, but expressly did not rule on Fitz's request for attorneys' fees.

Gilbert filed a motion for rehearing or for new trial. The trial court denied the motion and signed a final judgment granting Fitz's request for specific performance of the settlement agreement, dismissing Gilbert's claims, and awarding Fitz $10,000 in attorneys' fees.

Standard of Review

We review a trial court's grant or denial of summary judgment de novo. *Sw. Bell Tele., L.P. v. Emmett*, 459 S.W.3d 578, 583 (Tex. 2015). We consider the evidence presented in the light most favorable to the non-movant, crediting evidence favorable to the non-movant if

reasonable jurors could and disregarding evidence contrary to the non-movant unless reasonable jurors could not. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We indulge every reasonable inference and resolve any doubts in the non-movant's favor. *20801, Inc. v. Parker*, 249 S.W.3d 392, 399 (Tex. 2008).

To prevail on a traditional motion for summary judgment, the moving party must prove there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). If the movant meets the burden of establishing each element of the claim or defense on which it seeks summary judgment, the burden then shifts to the non-movant to disprove or raise an issue of fact as to at least one of those elements. *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014). The non-movant has the burden in its summary-judgment response to either (1) present a disputed fact issue on the opposing party's failure to satisfy its burden of proof, or (2) establish at least the existence of a fact issue on each element of an affirmative defense. *Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995) (party may defeat motion for summary judgment by presenting evidence sufficient to raise fact issue); *Brownlee v. Brownlee*, 665 S.W.2d 111, 112 (Tex. 1984) (party opposing summary judgment based on affirmative defense must come forward with summary judgment evidence sufficient to raise issue of fact on each element of defense).

Breach of Contract

In his first issue, Gilbert contends the trial court erred by granting summary judgment on Fitz's counterclaim for breach of contract because Fitz failed to conclusively establish there was a meeting of the minds between Alvarez and Gilbert as to the terms of the settlement agreement.

To prevail on a breach of contract claim, a party must prove (1) the existence of a valid contract, (2) the party performed or tendered performance, (3) the other party breached the

contract, and (4) damages resulting from the breach. *United States Catastrophic Re-Constructors, Inc. v. Spencer*, No. 05-14-01150-CV, 2015 WL 7075163, at *4 (Tex. App.—Dallas Nov. 13, 2015, no pet.) (mem. op.); *Woodhaven Partners, Ltd. v. Shamoun & Norman, L.L.P.*, 422 S.W.3d 821, 837 (Tex. App.—Dallas 2014, no pet.). Gilbert challenges only whether the summary judgment evidence conclusively established the existence of a valid contract.

In determining whether there is a valid, enforceable contract, oral agreements and settlement agreements are evaluated in the same manner as other contracts. *John H. Carney & Assocs. v. Office of the Attorney Gen. of Tex.*, No. 05-13-01325-CV, 2015 WL 4967240, at *7 (Tex. App.—Dallas Aug. 20, 2015, no pet.) (mem. op.) (settlement agreement); *Thornton v. Dobbs*, 355 S.W.3d 312, 316 (Tex. App.—Dallas 2011, no pet.) (oral agreement). For a contract to be enforceable, there must be: (1) an offer, (2) an acceptance in strict compliance with the terms of the offer, (3) a meeting of the minds, (4) each party's consent to the terms, and (5) execution and delivery of the contract with the intent that it be mutual and binding.[3] *Levetz v. Sutton*, 404 S.W.3d 798, 803 (Tex. App.—Dallas 2013, pet. denied); *see also Sacks v. Haden*, 266 S.W.3d 447, 450 (Tex. 2008) (per curiam) (meeting of the minds is necessary to formation of valid, binding contract). Consideration is also an essential element of any valid contract. *Tour De Force, Ltd. v. Barr*, No. 05-14-01430-CV, 2016 WL 1179417, at *2 (Tex. App.—Dallas Mar. 28, 2016, no pet.) (mem. op.); *MG Bldg. Materials, Ltd. v. Moses Lopez Custom Homes, Inc.*, 179 S.W.3d 51, 61 (Tex. App.—San Antonio 2005, pet. denied).

A "meeting of the minds" signifies "the parties mutual understanding and assent to the agreement regarding the subject matter and the essential terms of the contract." *MacDonald Devin, PC v. Rice*, No. 05-14-00938-CV, 2015 WL 6468188, at *3 (Tex. App.—Dallas Oct. 27,

[3] In the case of an oral contract, the elements do not include execution and delivery of the contract. *Turner v. NJN Cotton Co.*, 485 S.W.3d 513, 521 (Tex. App.—Eastland 2015, pet. denied).

2015, no pet.) (mem. op.); *see also Kidwill v. Werner*, No. 10-05-00274-CV, 2006 WL 3627883, at *1 (Tex. App.—Waco Dec. 13, 2006, no pet.) (mem. op.). In determining whether a meeting of the minds occurred, we review in an objective fashion what the parties actually did and said, without considering their subjective intent. *Barr*, 2016 WL 1179417, at *2; *Choctaw Props., L.L.C. v. Aledo I.S.D.*, 127 S.W.3d 235, 245–46 (Tex. App.—Waco 2003, no pet.). In doing so, we look to the communications between the parties and to the acts and circumstances surrounding those communications. *Thornton*, 355 S.W.3d at 316.

The summary judgment evidence established that Alvarez, on behalf of Fitz, offered that GEICO would pay $500 and the medical expenses incurred by Gilbert on the date of the accident if Gilbert agreed to release his bodily injury claims against Fitz based on the accident. Gilbert accepted the offer. Alvarez instructed Gilbert to send her the medical bills for his treatment on the date of the accident, and GEICO issued a check for $500 payable to Gilbert. Relying on *Harris v. Balderas*, 27 S.W.3d 71 (Tex. App.—San Antonio 2000, pet. denied), Gilbert argues this evidence does not conclusively establish the existence of an oral agreement because "there was no consensus as to when the medical bills would be paid, how the bills would be paid, how much would be paid, or even whether [GEICO] intended to pay the expenses to Mr. Gilbert at all" and the release language on the check "indicated to the recipient that he would be receiving $500.00 alone for the settlement of his claim."

In *Harris*, Octavio, Consuelo, and Marta Balderas were injured in a car accident with Heather Harris. *Id.* at 73. Consuelo, who was the most badly injured, suffered severe brain damage. *Id.* The Balderases hired an attorney to represent them in their claims against Harris. *Id.* at 75. The attorney made a demand on Harris's insurance company for 1.5 million dollars for each of the Balderases. *Id.* However, if Harris did not have a sufficient amount of insurance to satisfy that demand, the attorney requested the demand be treated as "a full policy limits

demand," with the full per person amount to be paid to Consuelo and the remainder per accident limits to be divided between Marta and Octavio. *Id.* At the time of the accident, Harris's insurance policy limits were $20,000 per person and $40,000 per accident. *Id.*

The insurance adjuster called the attorney's office and told a paralegal that the insurance company was tendering the per person policy limit for Consuelo's claim. *Id.* According to the adjuster, he later discussed with the paralegal whether Octavio's name should be included on the check and release and assured the paralegal that placing Octavio's name on the check and release would not constitute a release of Octavio's bodily injury claim. *Id.* at 76. The insurance adjuster then issued a settlement check for $20,000 along with a release, both of which included Octavio's name. *Id.* Noted on the check was: "Nature of Payment: Any & [A]ll Claims, Liens, Assignment of Interest, Subrogation [C]laims, of Consuelo Balderas' bodily injury claim only." *Id.*

The release, which was a pre-printed form, stated it was for all claims "for bodily injury claim of Consuelo Balderas only." *Id.* However, the text of the form purported to release:

> Any and all claims, actions, causes of action, demands, rights, damages, costs, loss of service, expenses and compensation whatsoever, which the undersigned now has/have or which may hereafter accrue on account of or in any way growing out of any and all known and unknown, foreseen and unforeseen bodily and personal injuries and property damage and the consequences thereof resulting [from the accident with Harris].

Id. The release contained spaces for both Consuelo and Octavio to sign. *Id.* The Balderases' attorney returned the check to the insurance adjuster, stating it did not meet the demand because it improperly attempted to bind both Octavio and Consuela to the same $20,000 limit. *Id.* The Balderases sued Harris, and her insurance company intervened in the lawsuit. *Id.* at 73.

The parties filed competing motions for summary judgment on the issue of whether there was a valid settlement agreement. *Id.* The trial court ruled that no settlement agreement existed as a matter of law, and Harris and her insurance company appealed. *Id.* One of the bases for the

appellate court's affirmation the trial court's ruling was that the summary judgment evidence did not establish a meeting of the minds on the essential terms of the agreement. *Id.* at 78. Rather, the evidence indicated "the parties had varying interpretations of exactly which claims were being settled and of what portion of the $20,000 Consuelo would receive." *Id.*[4] Because there was a fact issue regarding whether the parties had a meeting of the minds on the claims to be settled, Harris and her insurance company were not entitled to summary judgment. *Id.* at 79.

In this case, there was no confusion about which claims were being settled. Rather, Gilbert agreed to release his bodily injury claims against Fitz based on the July 22, 2014 accident in exchange for $500 and the payment of the medical expenses he incurred on the date of the accident. Alvarez instructed Gilbert to send her any medical bills he received for treatment on the date of the accident and requested that he complete a HIPAA Compliant Authorization form to allow GEICO to communicate with his health care providers. Accordingly, there could be no confusion about whether GEICO would pay the medical bills once they were provided by Gilbert.[5] The mechanics of how Gilbert's medical expenses would be paid once he provided the bills to Alvarez was an ancillary matter that was not material to the agreement. *See Padilla v. LaFrance*, 907 S.W.2d 454, 460–61 (Tex. 1995) (valid contract formed based on agreement to pay in future); *Cunningham v. Zurich Am. Ins. Co.*, 352 S.W.3d 519, 529 (Tex. App.—Fort Worth 2011, pet. denied) (essential terms of settlement agreement were an agreement to pay in exchange for release of liability).

As to the release language on the GEICO check, Alvarez immediately issued the check because GEICO had an obligation under the terms of the settlement agreement to pay Gilbert

[4] The issue in the trial court and on appeal was whether there had been an agreement to settle Octavio's loss of consortium claim. *Harris*, 27 S.W.3d at 78–79.

[5] Although Gilbert stated he expected to receive a written settlement agreement in the mail, this subjective belief is insufficient to prevent the formation of a valid oral contract. *See Barr*, 2016 WL 1179417, at *2; *Choctaw Props., L.L.C.*, 127 S.W.3d at 245–46.

$500. The check was sent to Gilbert after he reached an unambiguous agreement with Alvarez. Any language on the check that failed to comply with that agreement would not impact whether there had been a meeting of the minds on the terms of the agreement during the conversation between Alvarez and Gilbert.

Viewed in an objective fashion, the communications between Alvarez and Gilbert, as well as the acts and circumstances surrounding those communications, conclusively established a valid oral contract existed between GEICO, on behalf of Fitz, and Gilbert after the July 30, 2014 telephone call. *See Thornton*, 355 S.W.3d at 316. Accordingly, the trial court did not err by determining Fitz met her summary judgment burden of conclusively showing the existence of a valid contract. We resolve Gilbert's first issue against him.

Material Breach and/or Repudiation

In his second issue, Gilbert contends the trial court erred by granting Fitz's motion for summary judgment because there was a genuine issue of fact as to whether GEICO materially breached or repudiated the settlement agreement. Both material breach and repudiation are affirmative defenses on which Gilbert had the burden of proof. *See Compass Bank v. MFP Fin. Servs., Inc.*, 152 S.W.3d 844, 852 (Tex. App.—Dallas 2005, pet. denied) (material breach); *Cook Composites, Inc. v. Westlake Styrene Corp.*, 15 S.W.3d 124, 139 (Tex. App.—Houston [14th Dist.] 2000, pet. dism'd) (repudiation).

A party breaches a contract by failing to perform an act that it has expressly or impliedly promised to perform. *Examination Mgmt. Servs., Inc. v. Kersh Risk Mgmt., Inc.*, 367 S.W.3d 835, 844 (Tex. App.—Dallas 2012, no pet.). "It is a fundamental principal of contract law that when one party to a contract commits a material breach of that contract, the other party is discharged or excused from further performance." *Mustang Pipeline Co., Inc. v. Driver Pipeline Co., Inc.*, 134 S.W.3d 195, 196 (Tex. 2004) (per curiam). By contrast, if a breach is determined

to be immaterial, "the nonbreaching party is not excused from future performance but may sue for the damages caused by the breach." *Levine v. Steve Scharn Custom Homes, Inc.*, 448 S.W.3d 637, 654 (Tex. App.—Houston [1st Dist.] 2014, pet. denied); *see also Fritz Mgmt., LLC v. Huge Am. Real Estate, Inc.*, No. 05-14-00681-CV, 2015 WL 3958292, at *2 (Tex. App.—Dallas June 30, 2015, pet. dism'd w.o.j.) (mem. op.). Whether a party's breach is so material as to render the contract unenforceable is ordinarily a question of fact. *Examination Mgmt. Servs., Inc.*, 367 S.W.3d at 844.

Repudiation is "a positive and unconditional refusal to perform the contract in the future, expressed either before performance is due or after partial performance." *CMA-CGM (Am.), Inc. v. Empire Truck Lines, Inc.*, 416 S.W.3d 495, 519 (Tex. App.—Houston [1st Dist.] 2013, pet. denied); *see also White v. Harrison*, 390 S.W.3d 666, 672 (Tex. App.—Dallas 2012, no pet.). It is conduct that shows a "fixed intention to abandon, renounce, and refuse to perform the contract." *P&E Contractors, Inc. v. Brown*, No. 05-10-00743-CV, 2012 WL 3061777, at *2 (Tex. App.—Dallas July 27, 2012, no pet.) (mem. op.); *see also CMA-CGM (Am.), Inc.*, 416 S.W.3d at 519. "A repudiation is accomplished by a contracting party's words or actions that indicate he is not going to perform his contract in the future," *White*, 390 S.W.3d at 672, and "must be absolute and unconditional." *Hunter v. PriceKubecka, PLLC*, 339 S.W.3d 795, 802 (Tex. App.—Dallas 2011, no pet.).

Gilbert contends GEICO materially breached the settlement agreement by failing to pay the medical expenses he incurred on the date of the accident and by conveying a refusal to pay the medical expenses through the release language on the check that it sent to him. Gilbert further asserts that GEICO repudiated its contractual obligation to pay the medical expenses he incurred on the date of the accident by including the release language on the check it sent to him. *See Murray v. Crest Constr., Inc.*, 900 S.W.2d 342, 344 (Tex. 1995) (per curiam) (party

repudiated settlement agreement by telling other party to agreement it would not perform on promissory note when its performance became due).

The summary judgment evidence established the terms of the settlement agreement were that GEICO would pay $500 and the medical expenses Gilbert incurred on the date of the accident, and Gilbert would release his bodily injury claims against Fitz based on the accident. Alvarez instructed Gilbert to send his medical bills to her and requested that he complete a HIPAA Compliant Authorization form to allow GEICO to communicate with his health care providers. Gilbert did neither and subsequently indicated through his attorney that he did not intend to comply with the settlement agreement. Alvarez immediately responded to Gilbert's attorney that Gilbert's bodily injury claim had been settled and, on at least two occasions, spoke with Gilbert's attorney's office about the status of Gilbert's medical bills. Without the medical bills or the ability to communicate with Gilbert's health care providers regarding his medical expenses, GEICO could not pay the medical expenses Gilbert incurred on the date of accident. Under these circumstances, GEICO's failure to do so was not a material breach of the settlement agreement.

We next consider Gilbert's assertion that the release language GEICO included on the check it sent to him was either a material breach or a repudiation of the settlement agreement. The check met GEICO's obligation under the settlement agreement to pay Gilbert $500. Accordingly, the check was a material breach or a repudiation of the settlement agreement only if the release language on the check indicated that GEICO was refusing to pay the medical expenses that Gilbert incurred on the date of the accident. As discussed above, because Gilbert failed to provide GEICO with either his medical bills or a signed HIPAA Compliant Authorization form, GEICO was unable to obtain the information it needed to pay Gilbert's medical expenses. After Gilbert indicated through his attorney that he did not intend to comply

with the settlement agreement, Alvarez repeatedly took the position that Gilbert's bodily injury claims were settled and sought information regarding his medical bills from his attorney. Under these circumstances, we cannot conclude the evidence raised a genuine issue of fact that GEICO either materially breached or absolutely and unconditionally repudiated its agreement to pay the medical expenses incurred by Gilbert on the date of the accident. *See Examination Mgmt. Servs., Inc.*, 367 S.W.3d at 844; *Hunter*, 339 S.W.3d at 802.

We conclude Gilbert failed to raise a genuine issue of fact on either of the affirmative defenses of material breach or repudiation. We resolve his second issue against him.

Conclusion

The summary judgment evidence conclusively established a valid oral settlement agreement between GEICO's adjuster, Alvarez, and Gilbert. Further, Gilbert failed to present evidence that raised a genuine issue of fact on his affirmative defenses that GEICO materially breached or repudiated the agreement. Accordingly, the trial court did not err by granting Fitz's motion for summary judgment. We affirm the trial court's judgment.

/Robert M. Fillmore/
ROBERT M. FILLMORE
JUSTICE

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

WINDELL GILBERT, Appellant

No. 05-16-00218-CV V.

CHERISH FITZ, Appellee

On Appeal from the County Court at Law No. 4, Dallas County, Texas, Trial Court Cause No. CC-15-01125-D. Opinion delivered by Justice Fillmore, Justices Brown and Richter participating.

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

It is **ORDERED** that appellee Cherish Fitz recover her costs of this appeal from appellant Windell Gilbert.

Judgment entered December 21, 2016.