

REVERSE and REMAND and Opinion Filed October 2, 2020



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

No. 05-18-00978-CV

**TEXAS MUTUAL INSURANCE COMPANY, Appellant
V.
CORBY W. STEVENSON, Appellee**

**On Appeal from the 354th Judicial District Court
Hunt County, Texas
Trial Court Cause No. 82551**

MEMORANDUM OPINION

Before Chief Justice Burns, Justice Whitehill, and Justice Nowell
Opinion by Chief Justice Burns

Texas Mutual Insurance Company appeals the trial court's summary judgment in favor of Corby W. Stevenson. In a single issue, Texas Mutual argues the trial court erred in granting a summary judgment that dismissed its claims for subrogation against Stevenson. We reverse the trial court's judgment and remand this case for further proceedings consistent with this opinion.

In July 2013, Stevenson ruptured his Achilles tendon in the course of his employment with FSTI, Inc. Texas Mutual, the worker's compensation carrier for FSTI, paid worker's compensation benefits to and on behalf of Stevenson for his

injuries. Because of alleged mistreatment by his health care providers, Stevenson underwent multiple surgeries to address his injuries. In January 2015, Stevenson filed a lawsuit against his health care providers alleging negligence causes of action.

In February 2018, Texas Mutual filed its original petition in intervention to recover its “subrogation lien for medical and indemnity benefits of \$318,551.33 paid to and on behalf of” Stevenson. In May 2018, Stevenson filed a traditional motion for summary judgment against Texas Mutual arguing the applicable workers’ compensation policy contained a waiver of all rights to seek subrogation otherwise allowed under the Texas Workers’ Compensation Act. The waiver provided the following:

**TEXAS WAIVER OF OUR RIGHT TO RECOVER FROM OTHERS
ENDORSEMENT**

This endorsement applies to the insurance provided by the Policy because Texas is shown in Item 3.A. of the Information Page.

We have the right to recover our payments from anyone liable for an injury covered by this policy. We will not enforce our right against the person or organization named in the Schedule, but this waiver applies only with respect to bodily injury arising out of the operations described in the Schedule where you are required by a written contract to obtain this waiver from us.

This endorsement shall not operate directly or indirectly to benefit anyone not named in the Schedule.

The premium for this endorsement is shown in the Schedule.

Schedule

1. () Specific Waiver

Name of person or organization

(X) Blanket Waiver

Any person or organization for whom the Named Insured has agreed by written contract to furnish this waiver.

2. Operations: ALL TEXAS OPERATIONS

3. Premium

The premium charge for this endorsement shall be 2.00 percent of the premium developed on payroll in connection with work performed for the above person(s) or organization(s) arising out of the operations described.

Based on this waiver, Stevenson argued Texas Mutual had “waived any right to subrogation, reimbursement, or for future credits.” In making this argument, Stevenson relied on *Wausau Underwriters Insurance Company v. Wedel*, 557 S.W.3d 554 (Tex. 2018), which Stevenson claimed involved “identical waiver-of-subrogation endorsements as approved by the Texas Department of Insurance.” In July 2018, the trial court signed an order granting Stevenson’s motion for summary judgment and dismissing Texas Mutual’s claims, “including requests for subrogation, reimbursement, and for future credits.” This appeal followed.

In its first issue, Texas Mutual argues the trial court erred in granting summary judgment in favor of Stevenson. Specifically, Texas Mutual argues the endorsement in Texas Mutual’s workers’ compensation policy waived Texas Mutual’s subrogation rights only if a contract between the employer insured and a third party required such a waiver, and Stevenson provided no evidence of such a contract. In response, Stevenson argues (1) Texas Mutual “waived any issues as grounds for

reversal” by failing to file a response to Stevenson’s motion for summary judgment and (2) the trial court ruled correctly in granting Stevenson’s motion for summary judgment.

The standard for reviewing a traditional summary judgment is well known. *See Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985); *McAfee, Inc. v. Agilysys, Inc.*, 316 S.W.3d 820, 825 (Tex. App.—Dallas 2010, no pet.). The movants have the burden of showing that no genuine issue of material fact exists and that they are entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c). In deciding whether a disputed material fact issue exists precluding summary judgment, evidence favorable to the nonmovant will be taken as true. *Nixon*, 690 S.W.2d at 549; *In re Estate of Berry*, 280 S.W.3d 478, 480 (Tex. App.—Dallas 2009, no pet.). Every reasonable inference must be indulged in favor of the nonmovant and any doubts resolved in his favor. *City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005). We review a summary judgment de novo to determine whether a party’s right to prevail is established as a matter of law. *Dickey v. Club Corp. of Am.*, 12 S.W.3d 172, 175 (Tex. App.—Dallas 2000, pet. denied).

A motion for summary judgment must stand on its own merits. *M.D. Anderson Hosp. and Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000); *James M. Clifton, Inc. v. Premillennium, Ltd.*, 229 S.W.3d 857, 859 (Tex. App.—Dallas 2007, no pet.). Thus, a nonmovant has no burden to respond to a summary judgment motion unless the movant conclusively establishes its cause of action or defense.

Willrich, 28 S.W.3d at 23–24 (Tex. 2000); *Premillennium*, 229 S.W.3d at 859. Thus, Stevenson’s argument that Texas Mutual’s failure to file a response waives all issues as grounds for reversal lacks merit.

On the issue of whether the trial court erred in granting Stevenson’s motion for summary judgment, the case Stevenson relied on involved a contract between an employer and a third party requiring that the employer’s workers’ compensation policy contain a waiver of subrogation rights. *Wedel*, 557 S.W.3d at 555. Here, Stevenson conceded at oral argument that the record in this case does not contain a written contract requiring a waiver of subrogation. The waiver in this case applied only to any “person or organization for whom the Named Insured has agreed by written contract to furnish this waiver.” Without such a contract, there was no evidence to show Texas Mutual waived its subrogation rights. Accordingly, the trial court erred in granting summary judgment in favor of Stevenson. *See Nixon*, 690 S.W.2d at 549; *City of Keller*, 168 S.W.3d at 824. We sustain Texas Mutual’s sole issue.

We reverse the trial court’s order granting summary judgment and remand this cause for further proceedings consistent with this opinion.

/Robert D. Burns, III/
ROBERT D. BURNS, III
CHIEF JUSTICE



**Court of Appeals
Fifth District of Texas at Dallas**

JUDGMENT

TEXAS MUTUAL INSURANCE
COMPANY, Appellant

No. 05-18-00978-CV V.

CORBY W. STEVENSON, Appellee

On Appeal from the 354th Judicial
District Court, Hunt County, Texas
Trial Court Cause No. 82551.

Opinion delivered by Chief Justice
Burns. Justices Whitehill and Nowell
participating.

In accordance with this Court's opinion of this date, the judgment of the trial court is **REVERSED** and this cause is **REMANDED** to the trial court for further proceedings consistent with this opinion.

It is **ORDERED** that appellant TEXAS MUTUAL INSURANCE COMPANY recover its costs of this appeal from appellee CORBY W. STEVENSON.

Judgment entered this October 2, 2020.