AFFIRMED and Opinion Filed November 12, 2020

In The
Court of Appeals
Fifth District of Texas at Dallas

No. 05-18-01421-CV

WAL-MART STORES, INC.; WAL-MART STORES EAST, LP; WAL-MART LOUISIANA, LLC; SAM'S EAST, INC., AND SAM'S WEST, INC., Appellants
V.
XEROX STATE & LOCAL SOLUTIONS, INC. A/K/A/, F/K/A ACS STATE & LOCAL SOLUTIONS, INC., Appellee

On Appeal from the 44th Judicial District Court
Dallas County, Texas
Trial Court Cause No. DC-15-13629

MEMORANDUM OPINION

Before Chief Justice Burns[1], Justice Whitehill, and Justice Nowell
Opinion by Chief Justice Burns

Wal-Mart Stores, Inc., Wal-Mart Stores East, LP, Wal-Mart Louisiana, LLC, Sam's East, Inc., and Sam's West, Inc., appeal the trial court's May 30, 2017 order granting in part the motion for summary judgment of Xerox State and Local Solutions, Inc., previously known as ACS State & Local Solutions, Inc., and August 23, 2018 order granting Xerox's traditional and no-evidence motion for summary

[1] The Honorable David Bridges, Justice, participated in the submission of this appeal; however, he did not participate in the issuance of this opinion due to his death on July 25, 2020. Chief Justice Burns has reviewed the record and the briefs in this cause.

judgment. In two issues, Wal-Mart argues the trial court erred in granting Xerox summary judgment relief in both its 2017 and 2018 orders. We affirm the trial court's judgment.

The Supplemental Nutritional Assistance Program (SNAP) is a federal program that offers nutritional assistance to eligible, low-income individuals and families. The Food and Nutrition Service (FNS) administers the SNAP program and works with the retail community to improve the program's administration and ensure the program's integrity. Some of Wal-Mart's customers utilize SNAP. Appellees operated a data processing system for SNAP payments to retailers accepting SNAP card payments from individuals with SNAP cards. In November 2015, Wal-Mart commenced suit for recovery of underpayment by Appellee of reimbursement of claims, following a computer outage at Appellee's data processing center.

While the states determine most administrative details and modify the SNAP program to meet the needs of their populations, the states must adhere to the rules and regulations governing SNAP as set forth in the Code of Federal Regulations. The "Food Stamp and Food Distribution Program" is governed by 7 C.F.R. Part 271. As part of the SNAP program, Xerox operates a system for electronically verifying government assisted food purchases, sometimes called Electronic Benefits Transfers (EBTs).

On October 12, 2013, Xerox failed to provide Wal-Mart advance notice of planned maintenance that caused a system outage, failed to restore its system for

more than ten hours, failed to use its backup system to process EBT transactions, failed to provide Wal-Mart timely updates during the system outage, and gave Wal-Mart incorrect information. Xerox had previously performed maintenance on its system during non-peak transaction times, a practice that limited the number of EBT transactions Wal-Mart would have to have verified later, through a process known as "store and forward."

However, Xerox's actions on October 12, 2013 prevented Wal-Mart from electronically verifying thousands of EBT transactions at over 1400 Wal-Mart stores and Sam's Club locations. Rather than turn these customers away, Wal-Mart allowed customers using the EBT system to purchase groceries using their EBT cards without instant verification. Wal-Mart used the "store and forward" method of holding the unverified EBT transactions in a queue for processing by Xerox following the restoration of its system. Although Xerox processed and reimbursed Wal-Mart for many of these EBT transactions, Xerox refused to process approximately 55,000 other transactions. Wal-Mart claimed these other transactions were not processed because Xerox represented that its system was available to process the store and forward transactions at a time when its system had not been restored. When Wal-Mart submitted the transactions for verification, it received generic and erroneous declination of payments that precluded Wal-Mart from resubmitting the transactions for processing electronically. As a result of Xerox's

"misrepresentations and other actions and omissions," Wal-Mart claimed it was damaged in excess of $4,000,000.

In March 2017, Xerox filed a motion for summary judgment arguing that all of Wal-Mart's claims and alleged damages stemmed from Wal-Mart's own decision to use a store and forward EBT settlement process. Xerox argued federal regulations governing a retailer's use of store and forward explicitly provided that "[s]tate agencies may opt to allow retailers, at the retailer's own choice and liability, to perform store-and-forward transactions when the EBT system cannot be accessed for any reason," citing 7 CFR section 274.8(e)(1).

Xerox's motion provided the following factual background: Xerox operates a system for electronically verifying EBTs under the SNAP program. During the "system outage" on October 12, 2013 Wal-Mart allowed recipients using the EBT system to purchase groceries using their EBT cards without instant verification. Instead, Wal-Mart used the "store and forward" method of holding the unverified EBT transactions in a queue for processing by Xerox with the hope that these transactions would be processed and settled upon restoration of Xerox's system. In doing so, "Wal-Mart took the risk that these 'store and forward' transactions might ultimately be denied for insufficient funds (*i.e.*, an individual may not have enough benefits on his or her EBT card to cover the full amount purchased) or that they might not actually be authorized for payment to Wal-Mart after the customer left the retail site."

Xerox alleged all of the damages Wal-Mart sought in this case resulted from "store and forward' transactions," and Wal-Mart also brought claims for breach of express and implied contract, negligent misrepresentation, negligence, and promissory estoppel based on the "store and forward" transactions. Xerox reiterated that, under 7 CFR section 274.8(e)(1), when an EBT system cannot be accessed for any reason, the retailer may choose to "perform store-and-forward transactions" but only at its "own . . . liability." Consequently, Xerox argued, the only fact the trial court was to consider in ruling on Xerox's motion was whether Wal-Mart used the "store and forward" method for the transactions in dispute. "By Wal-Mart's own admission," Xerox argued, Wal-Mart did use the "store and forward" method. Thus, Wal-Mart's arguments about "Xerox's fault" or "why Xerox's systems could not be accessed" were irrelevant to the trial court's analysis.

On May 30, 2017, the trial court granted Xerox's summary judgment in part "as to the EBT transactions that were denied in connection with the October 12, 2013 Outage because the EBT benefit recipients either lacked sufficient funds in their accounts to cover their purchases or because the EBT benefit recipient entered an invalid PIN number." In all other respects, the trial court denied Xerox's motion for summary judgment.

In October 2017, Xerox filed a motion for traditional and no-evidence summary judgment on "Wal-Mart's remaining claims for alleged damages." The motion characterized Wal-Mart's remaining claims as relating "entirely to the

remaining Store-and-Forward transactions that Xerox allegedly 'failed to process' because of a purported system error." Xerox argued (1) there was no contractual relationship between Xerox and Wal-Mart, and Xerox therefore owed no contractual duties to Wal-Mart and (2) Wal-Mart's remaining alleged damages resulted from Wal-Mart's own improper configuration of its "store and forward" functionality and its independent decision to use that function and "bear the risk of denial, for any reason, of a Store-and-Forward Food Stamp Transaction[.]"

Specifically, Xerox argued the "store and forward" transactions "failed to process" not because of anything Xerox did but "because Wal-Mart itself configured its Store-and-Forward queue so that they could not be resubmitted to Xerox for processing." Xerox described Wal-Mart's use of "store and forward" transactions as follows:

> To send transactions to Xerox for processing, Wal-Mart relied upon First Data as an intermediary third-party processor, also known as a "merchant acquirer." As explained by First Data's corporate representative, Wal-Mart would connect to First Data's processing platform and send First Data the EBT transactions that Wal-Mart had transacted at its point-of-sale (i.e., the cash register). First Data would then route these transactions to Xerox for authorization through separate connections to Xerox's EBT processing platform. Once received, Xerox would then return transaction-specific response codes (e.g., "approve" or "decline") to First Data, which First Data would then forward to Wal-Mart. However, First Data and Wal-Mart improperly "translated" Xerox's valid transaction response codes, causing Wal-Mart to dismantle the Store-and-Forward transactions and to "terminate" the transaction, thus removing the transactions from Wal-Mart's Store-and-Forward queue and ending the possibility of later resubmission. Wal-Mart's failure to properly configure its system,

> including its failure to properly map the response codes returned by Xerox, was the direct cause of its damages in this case.
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> During the Outage, Xerox had two mini-switches connecting to First Data used to facilitate the processing of EBT transactions originating from Wal-Mart: the First Data switch and the Concord switch. "Mini-switches" are essentially the systems that receive transactions from a third-party processor platform and direct those transactions to the appropriate state database within Xerox's EBT platform for processing (e.g., a Louisiana EBT transaction will be directed to the Louisiana EBT database). The state databases—often referred to as "EPPIC application/database servers"—are the platforms that ultimately process the EBT transactions by rendering a financial determination (e.g., approved for sufficient funds) or issuing a transaction account specific denial (e.g., not approved, because of invalid PIN).
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> As relevant here, there may be times when a mini-switch sends a transaction to the application/database servers, but the EPPIC application/databases, while up, may not be fully operational (e.g., the state EPPIC systems are up, but cannot connect to the underlying database or otherwise lack a stable connection to that database). When this happens, Xerox's system sends First Data a transaction response code 19. A response code 19 means "re-enter transaction" and informs First Data that the database is coming up, but is not fully operational and cannot authorize transactions.
>
> By contrast, Xerox only returns a response code 05 (defined in the specifications as a "general denial") when the application server and databases are fully operational and no longer in a degraded state. A response code 05 means that the transaction has reached the application/database servers, but approval is declined due to an issue with that specific transaction or card account. An "05" is considered a "transactional denial", which would only occur when the systems are operational. Thus, Xerox's return of any 05s to Wal-Mart would have been valid responses.

In its brief, Xerox asserts that, after the trial court's first summary judgment, all remaining transactions at issue involved Xerox returning a code 19 or 05 to First

Data. In its second motion for summary judgment, Xerox described the manner in which Wal-Mart configured its "store and forward" transactions:

> Wal-Mart developed and configured the Store-and-Forward functionality that was in place on the day of the Outage. Prior to the Outage, Wal-Mart developed and coded its Store-and-Forward functionality to respond a certain way when it received various codes from the acquirer or the issuer processor—codes that would cause Wal-Mart's system either to store the transaction and resubmit later or to terminate the transaction.

Whereas Wal-Mart's petition alleged that, when it attempted to process its "store and forward" transactions after service was restored, it received "generic and erroneous declines" from Xerox that precluded Wal-Mart from resubmitting the transactions for processing electronically, Xerox argued Wal-Mart was to blame for the problem. Specifically, Xerox argued Wal-Mart's "store and forward" transaction log from the day of the outage showed Wal-Mart did not receive a single response code 19, the code that indicates the database is not fully operational. Xerox argued this was because Wal-Mart had instructed First Data to translate Xerox's response code 19 to different response codes than what First Data received. Wal-Mart then configured its own Store-and-Forward system to remove these translated codes from the Store-and-Forward queue. Thus, Xerox argued, summary judgment was proper on Wal-Mart's remaining claims.

In October 2017, Wal-Mart filed a motion for partial summary judgment holding Xerox liable for EBT transactions conducted during the outage that were "declined or not processed when Xerox's system again became available." Among

other things, Wal-Mart argued it was an intended third-party beneficiary of the contract between Xerox and First Data, and Xerox was liable for negligent misrepresentations it made to Wal-Mart. In August 2018, the trial court signed an order granting Xerox's traditional and no-evidence motion for summary judgment, and this appeal followed.

In its first issue, Wal-Mart argues the trial court erred in granting Xerox's first motion for summary judgment. We review the trial court's summary judgment de novo. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215 (Tex. 2003). A party moving for traditional summary judgment has the burden to prove that there is no genuine issue of material fact and it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). "When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

Wal-Mart begins its argument by asserting that Xerox's first motion for summary judgment was "based solely on causation," and "the summary judgment was based on Xerox's sole claim to have disproven that it was the cause of Wal-Mart's damages as a matter of law." Xerox points out that its first motion for summary judgment "does not even use the word "causation." Instead, Xerox's motion was based on the argument that, under the code of federal regulations, Wal-

Mart bore the risk of using "store and forward" transactions. Specifically, Xerox quoted the provision that "[s]tate agencies may opt to allow retailers, at the retailer's own choice and liability, to perform store-and-forward transactions when the EBT system cannot be accessed for any reason," citing 7 CFR section 274.8(e)(1).

Wal-Mart acknowledges that Xerox cited this federal regulation but argues the language of section 274.8(e)(1) "is an allocation of losses between the *states* and the retailers." Wal-Mart cites no authority for this assertion. Wal-Mart also refers to Xerox's contracts with unidentified states but, as Xerox argues, Wal-Mart "does not explain how those alleged rights under state-law contracts bear on the proper reading of a federal regulation." Wal-Mart further asserts generally that federal regulations and state contracts allowed Xerox's system to be down for approximately one hour per month, and any damages Wal-Mart incurred after that first hour were "clearly caused by Xerox's continuing failure to comply with this applicable standard." Again, however, Wal-Mart fails to establish how this standard somehow overcomes section 274.8(e)(1)'s imposition of liability on retailers who choose to use "store and forward" transactions. Because section 274.8(e)(1) is clear in imposing liability on Wal-Mart for the risks associated with its "store and forward" transactions, we conclude the trial court did not err in granting the first summary judgment. *See* 7CFR section 274.8(e)(1); *Fielding*, 289 S.W.3d at 848. We overrule Wal-Mart's first issue.

In its second issue, Wal-Mart argues the trial court erred in granting Xerox's second motion for summary judgment. Because Xerox's summary judgment motion was, in part, a no-evidence motion, we consider the evidence in the light most favorable to the non-movant. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750 (Tex. 2003). A no-evidence summary judgment is essentially a pretrial directed verdict, and we apply the same legal sufficiency standard in reviewing a no-evidence summary judgment as we apply in reviewing a directed verdict. *Id.* at 750–51. Accordingly, we review the evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences. *Id.* at 751. "A no evidence point will be sustained when (a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact." *Id.* Thus, a no-evidence summary judgment is improperly granted if the respondent brings forth more than a scintilla of probative evidence to raise a genuine issue of material fact. TEX. R. CIV. P. 166a(i); *Chapman*, 118 S.W.3d at 751. Less than a scintilla of evidence exists when the evidence is "so weak as to do no more than create a mere surmise or suspicion" of a fact. *Chapman*, 118 S.W.3d at 751. More than a scintilla of evidence exists when the evidence "rises to a level that would enable reasonable and fair-minded people to differ in their conclusions." *Id.*

Wal-Mart first addresses its claim of negligent misrepresentation against Xerox. The elements of a negligent misrepresentation cause of action are: (1) the representation is made by a defendant in the course of his business, or in a transaction in which he has a pecuniary interest; (2) the defendant supplies "false information" for the guidance of others in their business; (3) the defendant did not exercise reasonable care or competence in obtaining or communicating the information; and (4) the plaintiff suffers pecuniary loss by justifiably relying on the representation. *Bank of Texas, N.A. v. Glenny*, 405 S.W.3d 310, 313 (Tex. App.—Dallas 2013, no pet.).

Wal-Mart characterizes Xerox's second motion for summary judgment as "focused on a single statement" in Wal-Mart's petition: the allegation that Xerox "negligently and recklessly informed Wal-Mart that the system was restored and able to process the store and forward transactions when, in fact, it was not." In response to this allegation, Xerox quoted the deposition testimony of Matthew Howarter, Wal-Mart's employee who was on the single main communications line with network operations and First Data during the entire day of the outage. When Howarter was asked, "But at no point do you recall anyone ever saying, 'Okay. Submit them all. Now's the time to send over all the transactions'"? Howarter answered, "I don't."

Wal-Mart acknowledges Howarter's testimony in response to this "very specific question" but argues Howarter's testimony does not prove, as a matter of

law, that Xerox made no representation that the system was restored when it was not. Further, Wal-Mart argues Xerox failed to address "numerous other ways Xerox's misrepresentations caused Wal-Mart damage. Specifically, Wal-Mart argues the first misrepresentation was Xerox's "electronic misrepresentation that its entire system had been restored when it incorrectly opened the 'mini-switch' between Xerox and First Data without having connected the states' databases that held all customer account information, thus erroneously signaling that Xerox's system was ready to begin processing transactions held in the queue." Xerox's second alleged misrepresentation, Wal-Mart argues, was Xerox's repeated representations that "the system would be back up in 30 minutes." The third alleged misrepresentation occurred when Xerox "told Wal-Mart and First Data to send transactions one state at a time even though, in some cases, Xerox had not yet adequately ensured that a particular state's database was able to verify transactions."

The record shows Howarter testified he did not recall anyone ever saying, "Okay. Submit them all. Now's the time to send over all the transactions." Wal-Mart argues the significance of this testimony is limited because it came in response to a "very specific question." Instead, Wal-Mart focuses on several alleged "misrepresentations" that Xerox made during the many hours of the outage. Wal-Mart ignores the fact that, during the outage, the modifications it made with First Data to Xerox's transaction response codes were effectively terminating the "store and forward" transactions at issue. Further, the risk of using "store and forward"

transactions was on the retailer, Wal-Mart. *See* 7 CFR § 274.8(e)(1). All of Xerox's alleged "misrepresentations" occurred as part of attempts to restore the system. Wal-Mart seeks to isolate very specific steps in the day-long process of restoring the system and label these as "misrepresentations." However, we conclude the "misrepresentations" identified by Wal-Mart were not negligent misrepresentations that would subject Xerox to liability. *See Glenny*, 405 S.W.3d at 313.

Wal-Mart next addresses its negligence claims against Xerox. The elements of a negligence claim are the existence of a legal duty, a breach of that duty, and damages proximately caused by the breach. *Grand Champion Film Prod., L.L.C. v. Cinemark USA, Inc.*, 257 S.W.3d 478, 483 (Tex. App.—Dallas 2008, no pet.). Wal-Mart argues it was foreseeable to Xerox that retailers would sustain losses if Xerox's system went down without warning, and Xerox therefore owed a legal duty to Wal-Mart based on common law principles. Wal-Mart also argues that Xerox owed it a duty based on regulations setting forth standards of conduct for Xerox in processing EBT transactions and performance and technical standards. Wal-Mart argues Xerox owed it duties arising from Xerox's contracts with the states and by virtue of its agreement with First Data. In particular, Wal-Mart argues that, in the agreement with First Data, Xerox "agreed to indemnify merchants against any losses or damages that arise out of a malfunction of the cardholder authorization system or that arise from Xerox's negligence, or that arise from Xerox's failure to comply with the rules."

Xerox argues it owed no duty to Wal-Mart because the code of federal regulations "forecloses liability to a retailer from a processor such as Xerox," Wal-Mart and Xerox are not in privity, and Xerox cannot be charged with a duty to control Wal-Mart's decision to change the response codes sent to First Data or reconfigure its "store and forward" system.

Again, we note that the risk of using "store and forward" transactions was on Wal-Mart. *See* 7 CFR § 274.8(e)(1). Wal-Mart has no contract with Xerox. Without consulting Xerox, Wal-Mart worked with First Data to reconfigure the codes sent by Xerox. One person is under no duty to control the conduct of another, even if he has the practical ability to exercise such control. *Pagayon v. Exxon Mobil Corp.*, 536 S.W.3d 499, 504 (Tex. 2017). On this record, we conclude Xerox owed no duty to Wal-Mart that would give rise to liability on Wal-Mart's negligence claims.

Finally, Xerox's contract with First Data does provide that "Contractor," Xerox, "agrees to indemnify and hold harmless . . . Merchants against any and all claims, losses, costs, damages, liabilities or expenses . . . incurred as a result of a Transaction, attempted Transaction or other Transaction." However, these transactions are limited to transactions "initiated with a card purporting to be a Card but which was not properly issued by or on behalf of the State" and involved transactions not at issue here. Thus, the contract between Xerox and First Data does not provide that Xerox agrees to indemnify merchants generally.

Wal-Mart next addresses its claims of breach of contract. Wal-Mart asserts it is a third-party beneficiary to contracts Xerox had with 16 states and with First Data. To succeed on a breach of contract claim, a plaintiff must show: (1) a valid contract; (2) performance or tendered performance by the plaintiff; (3) breach of the contract by the defendant; and (4) damages sustained by the plaintiff as a result of the breach. *Marquis Acquisitions, Inc. v. Steadfast Ins. Co.*, 409 S.W.3d 808, 813 (Tex. App.—Dallas 2013, no pet.).

As a general rule, the benefits and burdens of a contract belong solely to the contracting parties, and "no person can sue upon a contract except he be a party to or in privity with it." *First Bank v. Brumitt*, 519 S.W.3d 95, 102 (Tex. 2017) (quoting *House v. Hous. Waterworks Co.*, 88 Tex. 233, 31 S.W. 179, 179 (1895)). An exception to this general rule permits a person who is not a party to the contract to sue for damages caused by its breach if the person qualifies as a third-party beneficiary. *Brumitt*, 519 S.W.3d at 102; *see, e.g., MCI Telecomms. Corp. v. Tex. Utils. Elec. Corp.*, 995 S.W.2d 647, 651 (Tex. 1999). Absent a statutory or other legal rule to the contrary, a person's status as a third-party beneficiary depends solely on the contracting parties' intent. *Brumitt*, 519 S.W.3d at102; *Stine v. Stewart*, 80 S.W.3d 586, 589 (Tex. 2002).

Specifically, a person seeking to establish third-party-beneficiary status must demonstrate that the contracting parties "intended to secure a benefit to that third party" and "entered into the contract directly for the third party's benefit." *Brumitt*,

519 S.W.3d at 102 (quoting *Stine*, 80 S.W.3d at 589); *see also S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 306 (Tex. 2007) (per curiam) ("A third party may only enforce a contract when the contracting parties themselves intend to secure some benefit for the third party and entered into the contract directly for the third party's benefit."). It is not enough that the third party would benefit—whether directly or indirectly—from the parties' performance, or that the parties knew that the third party would benefit. *Brumitt*, 519 S.W.3d at 102; *Sharyland Water Supply Corp. v. City of Alton*, 354 S.W.3d 407, 421 (Tex. 2011); *Lomas*, 223 S.W.3d at 306; *MCI*, 995 S.W.2d at 651. Nor does it matter that the third party intended or expected to benefit from the contract, for only the "intention of the contracting parties in this respect is of controlling importance." *Brumitt*, 519 S.W.3d at 102 (quoting *Banker v. Breaux*, 133 Tex. 183, 128 S.W.2d 23, 24 (1939)). To create a third-party beneficiary, the contracting parties must have intended to grant the third party the right to be a "claimant" in the event of a breach. *Brumitt*, 519 S.W.3d at 102 (quoting *Corpus Christi Bank & Tr. v. Smith*, 525 S.W.2d 501, 505 (Tex. 1975)).

To determine whether the contracting parties intended to directly benefit a third party and entered into the contract for that purpose, courts must look solely to the contract's language, construed as a whole. *Brumitt*, 519 S.W.3d at 102; *Southland Royalty Co. v. Pan Am. Petroleum Corp.*, 378 S.W.2d 50, 53 (Tex. 1964); *Citizens Nat'l Bank in Abilene v. Tex. & P. Ry. Co.*, 136 Tex. 333, 150 S.W.2d 1003, 1006 (1941). The contract must include "a clear and unequivocal expression of the

contracting parties' intent to directly benefit a third party," and any implied intent to create a third-party beneficiary is insufficient. *Brumitt*, 519 S.W.3d at 103 (quoting *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011)); *see also Stine*, 80 S.W.3d at 589; *MCI*, 995 S.W.2d at 651; *Citizens Nat'l Bank*, 150 S.W.2d at 1006.

Courts may not presume the necessary intent. *Brumitt*, 519 S.W.3d at 103. To the contrary, "we must begin with the presumption" that the parties contracted solely "for themselves," and only a clear expression of the intent to create a third-party beneficiary can overcome that presumption. *Brumitt*, 519 S.W.3d at 103 (quoting *Corpus Christi*, 525 S.W.2d at 503–04). If the contract's language leaves any doubt about the parties' intent, those "doubts must be resolved against conferring third-party beneficiary status." *Brumitt*, 519 S.W.3d at103 (quoting *Tawes*, 340 S.W.3d at 425). Although a contract may expressly provide that the parties do not intend to create a third-party beneficiary, *see, e.g.*, *MCI*, 995 S.W.2d at 651–52, the absence of such language is not determinative. *Brumitt*, 519 S.W.3d at 103. "Instead, the controlling factor is the absence of any sufficiently clear and unequivocal language demonstrating" the necessary intent. *Brumitt*, 519 S.W.3d at 103 (quoting *Tawes*, 340 S.W.3d at 428).

Wal-Mart argues "Proof of contract provisions allowing recovery by the plaintiff is sufficient evidence to confer third-party beneficiary status to *sue*" (emphasis added), citing *Paragon Sales Co. v. New Hampshire Ins. Co.*, 774 S.W.2d 659, 661 (Tex. 1989) (per curiam). Wal-Mart contends that, under *Paragon*,

evidence Wal-Mart presented of “contract provisions requiring Xerox to indemnify Wal-Mart” are “sufficient evidence” to “confer third-party beneficiary status.” Specifically, Wal-Mart argues the “Quest Rules,” which provide operating standards used in some state contracts, “imposed indemnity obligations on Xerox” and “required Xerox to plead and prove any contract provision excluding Wal-Mart from being a third-party beneficiary.” Because Xerox did not meet this burden, Wal-Mart argues, Xerox waived any contention that Wal-Mart was not a third-party beneficiary. The Quest Rules contain the following general indemnity provision:

> SECTION 10.3 Indemnification and Hold Harmless by Processors
>
> Each Processor other than a Network, including each CAS [Cardholder Authorization System] and Terminal Operator, shall indemnify and hold harmless each other Participant against any and all claims, losses, costs, damages, liabilities or expenses (including reasonable attorneys' fees) that are incurred as a result of a Transaction or attempted Transaction and that arise out of:
>
> a. The Authorization or denial of Authorization of a Transaction by such Processor operating a CAS;
>
> b. Malfunction of or failure to operate the CAS, Acquirer's or Network's system for processing and routing Transactions (unless such malfunction \vas caused by the party claiming indemnification);
>
> c. Unauthorized access being obtained to the systems utilized to process, route and authorize Transactions from any point in such system that is under the ownership or control of such Processor;
>
> d. The failure of the Processor to comply, as to any Transaction, with any Applicable Law;
>
> e. The negligence or fraudulent conduct of the Processor;
>
> f. The failure of the Processor to comply with these Rules; and

g. The Completion by the Processor of any Transaction denied by, or on behalf of; an Issuer.

However, *Paragon* does not stand for the proposition that this general indemnity provision, without more, conferred third-party beneficiary status on Wal-Mart. *See Paragon*, 774 S.W.2d at 660–661. In that case, Paragon, a distributor of gas barbeque grills, filed suit against New Hampshire Insurance Company seeking recovery for the value of goods lost in transit on a public motor carrier, Arkansas Express, Inc. *Id.* at 660. During April of 1981, Paragon ordered nearly $3,000 worth of assorted barbeque equipment from Arkla Industries, Inc., who shipped the goods via Arkansas Express. *Id.* The equipment never reached its destination. *Id.* Paragon reordered the goods and filed a claim for reimbursement from Arkansas Express. *Id.* Arkansas Express maintained insurance coverage on the freight it carried with respondent, New Hampshire Insurance Company (New Hampshire). *Id.* Arkansas Express subsequently filed Chapter 11 bankruptcy, but at all times listed Paragon as a creditor. *Id.*

After submitting the claim directly to the insurance company and receiving no action, Paragon filed suit alleging the right to recover as a third party beneficiary of the insurance contract. *Id.* A bench trial ensued at which the trial court rendered a take-nothing judgment against Paragon. *Id.* The court of appeals affirmed the trial court's take-nothing judgment against Paragon on the ground that Paragon failed to present any evidence of an indemnity contract between New Hampshire and Arkansas Express. *Id.* The court of appeals concluded that, "because the insurance

policy was never introduced into evidence, the evidence is legally insufficient to establish Paragon's standing to bring a direct action suit as a third party beneficiary." *Id.*

The supreme court noted the record contained an indemnity endorsement referring to a policy issued by New Hampshire to Arkansas Express. *Id.* The endorsement recited February 8, 1979 as the effective date of coverage, and the record showed coverage was cancelled as of February 9, 1982. *Id.* The loss occurred during April of 1981, within the coverage period. *Id.* The endorsement established that New Hampshire agreed to insure items shipped on Arkansas Express in the amounts of $5,000 per item, $10,000 per incident of loss. *Id.* The insurance documents also expressly provided for recovery by parties shipping goods, irrespective of whether Arkansas Express was insolvent or in bankruptcy. *Id.*

The supreme court cited authority holding that Texas law does not require that a plaintiff seeking recovery under an insurance policy must introduce the entire policy into evidence to prove the terms of the contract, and proof of the provisions allowing recovery of the plaintiff was sufficient to confer standing to sue. *Id.* at 661. The court held any exemptions, exceptions, or exclusions that would limit or deny the plaintiff's recovery must be pled as affirmative defenses by the defendant insurer. *Id.* Further, once the third party produces some evidence to establish standing as a third party beneficiary of a contract, it is incumbent on the opposite party to plead and prove the provisions of the contract, if any, that would limit or bar

recovery of the third party beneficiary. *Id.* Because the court concluded Paragon had presented some evidence to confer standing as a third party beneficiary under the indemnity contract between New Hampshire and Arkansas Express, the supreme court reversed the judgment of the court of appeals and remanded the case for further consideration. *Id.* Clearly, Wal-Mart is following the logic of *Paragon* in making its argument, but *Paragon* stands for the proposition that the indemnity endorsement in that case conferred standing to *sue*; it did not establish Paragon's status as a third-party beneficiary. *See id.* at 660–661.

Moreover, the Quest Rules also contain a more specific provision with respect to store and forward transactions:

> Store and Forward Food Stamp Transactions. If at any time, a POS Terminal Operator is unable electronically to communicate with a CAS or any entity providing Stand-In Authorization for the CAS because of a technical malfunction, the POS Terminal Operator may electronically store for up to twenty-four (24) hours and forward a Food Stamp Transaction, provided that the Cardholder's PIN is stored only in an encrypted format. The Transaction must be forwarded within twenty-four (24) hours of the original initiation of the Transaction, provided that this period shall be extended in twenty-four (24) hour increments if the POS Terminal Operator continues to be unable to communicate with the CAS or any entity providing Stand-In Processing for the CAS during each such twenty-four (24) hour period. Each Store and Forward Food Stamp Transaction is conducted at the risk and liability of the Acquirer and the Merchant. Any allocation of liability between the Acquirer and the Merchant shall be governed by the Merchant Agreement.

When interpreting an agreement, "[s]pecific and exact terms are given greater weight than general language." *Sefzik v. Mady Dev., L.P.*, 231 S.W.3d 456, 461 (Tex. App.—Dallas 2007, no pet.) (quoting *Pratt–Shaw v. Pilgrim's Pride Corp.*, 122

S.W.3d 825, 829 (Tex. App.—Dallas 2003, no pet.)). Thus, the more specific provision that each store and forward transaction is conducted at the risk and liability of the merchant prevails over the more general indemnity provision. *See id.* As a result, we conclude the Quest Rules do not confer third-party beneficiary status on Wal-Mart.

Similarly, the contract between Xerox and First Data does not establish Wal-Mart's status as a third-party beneficiary. Wal-Mart argues the First Data contract contained Xerox's promise "to indemnify merchants such as Wal-Mart for losses or damages arising from a malfunction of Xerox's system or from Xerox's negligence." As discussed previously, this promise applied only to falsified EBT cards. Further, the First Data contract expressly provided as follows:

> <u>No Third Party Beneficiaries</u>. This Agreement does not create, and shall not be construed as creating, any rights enforceable by any person not a party to this Agreement, except that the State and the Issuer shall be deemed third party beneficiaries of the representations, warranties, covenants and agreements of Processor hereunder.

We note this express provision is further indicative of Xerox's intention not to create any third-party beneficiaries in any of its contracts related to EBT transactions. *See Brumitt*, 519 S.W.3d at103.

To the extent Wal-Mart complains Xerox did not "attach the 'whole' contract" and "presented only select parts of the 6 state contracts," we note introduction of the relevant provisions may be sufficient. *See Paragon*, 774 S.W.2d at 660–661. Further, Wal-Mart does not cite any missing contractual provisions that might be

relevant to the third-party beneficiary analysis. Finally, Wal-Mart takes exception to the affidavit of Joseph Froderman, Xerox's vice president of payment services and product delivery, stating that Wal-Mart did not sign the underlying contracts, retailers do not contract with processors such as Xerox, and processors do not want unlimited liability. Wal-Mart argues Froderman's affidavit testimony "based upon information or a subjective belief is not competent summary judgment evidence." However, Wal-Mart does not identify anywhere in the record that it objected to Froderman's affidavit or obtained a ruling to those objections. We conclude the summary judgment evidence established Wal-Mart is not a third-party beneficiary. *See Brumitt*, 519 S.W.3d at103.

Wal-Mart next attempts to establish that an implied-in-fact contract existed between itself and Xerox. An implied-in-fact contract "arises from the acts and conduct of the parties, it being implied from the facts and circumstances that there was a mutual intention to contract." *Stewart Title Guar. Co. v. Mims*, 405 S.W.3d 319, 338–39 (Tex. App.—Dallas 2013, no pet.) (quoting *Haws & Garrett Gen. Contractors, Inc. v. Gorbett Bros. Welding Co*., 480 S.W.2d 607, 609 (Tex.1972). A meeting of the minds is an essential element of an implied-in-fact contract. *Mims*, 405 S.W.3d 319, 339. The court must look to the conduct of the parties to determine the terms of the contract on which the minds of the parties met. *Id.* The determination of a meeting of the minds is based on the objective standard of what the parties said and did, not on their subjective states of mind. *Id.*

Here, Wal-Mart again raises its argument that Xerox agreed to "indemnify participants like Wal-Mart under certain specified conditions." As we have discussed previously, those conditions were not present here. Looking at the conduct of the parties, it appears Xerox did not directly contract with Wal-Mart and therefore did not intend to enter a contractual relationship with Wal-Mart. Further, to the extent store and forward transactions such as the ones at issue were contemplated, Xerox intentionally and repeatedly entered into express contracts placing on Wal-Mart and other merchants the risk involved in such transactions. Under these circumstances, considering the acts and conduct of the parties, we conclude there is no evidence to support the existence of an implied-in-fact contract between Wal-Mart and Xerox. *See Mims*, 405 S.W.3d at 338–39. Wal-Mart did not contract directly with Xerox. Because we conclude the summary judgment evidence established Wal-Mart is not a third-party beneficiary, and no implied-in-fact contract existed between Wal-Mart and Xerox, Wal-Mart cannot recover on a claim for breach of contract.

Finally, we turn to Wal-Mart's argument that summary judgment was improper as to its claim of promissory estoppel. The elements of a promissory estoppel claim are (1) a promise, (2) foreseeability of reliance thereon by the promisor, and (3) substantial detrimental reliance by the promisee. *Trevino & Assocs. Mech., L.P. v. Frost Nat. Bank*, 400 S.W.3d 139, 146 (Tex. App.—Dallas 2013, no pet.). If the elements of promissory estoppel are met, then a promisee may

enforce an otherwise unenforceable contract. *See Transcontinental Realty Investors, Inc. v. John T. Lupton Trust*, 286 S.W.3d 635, 648 (Tex. App.—Dallas 2009, no pet.). The "promises" Wal-Mart refers to in its argument occurred in the course of Xerox's attempts to restore service. We have already determined these representations were not "negligent misrepresentations"; we similarly conclude these representations were not "promises" subject to enforcement under a promissory estoppel theory. *See id.* We conclude the trial court did not err in granting summary judgment on Wal-Mart's promissory estoppel claim. We overrule Wal-Mart's second issue.

We affirm the trial court's judgment.

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

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Court of Appeals
Fifth District of Texas at Dallas

JUDGMENT

WAL-MART STORES, INC.; WAL-MART STORES EAST, LP; WAL-MART LOUISIANA, LLC; SAM'S EAST, INC., AND SAM'S WEST, INC., Appellants

No. 05-18-01421-CV V.

XEROX STATE & LOCAL SOLUTIONS, INC. A/K/A/, F/K/A ACS STATE & LOCAL SOLUTIONS, INC., Appellee

On Appeal from the 44th Judicial District Court, Dallas County, Texas
Trial Court Cause No. DC-15-13629.
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 **AFFIRMED**.

It is **ORDERED** that appellee XEROX STATE & LOCAL SOLUTIONS, INC. A/K/A/, F/K/A ACS STATE & LOCAL SOLUTIONS, INC. recover its costs of this appeal from appellants WAL-MART STORES, INC.; WAL-MART STORES EAST, LP; WAL-MART LOUISIANA, LLC; SAM'S EAST, INC., AND SAM'S WEST, INC..

Judgment entered this 12th day of November 2020.