Opinion issued March 24, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-09-00838-CV

EDWARD MCDONALD, Appellant

V.

HOME STATE COUNTY MUTUAL INSURANCE COMPANY, PARAGON INSURANCE COMPANY, AND PARAGON INSURANCE GROUP, Appellees

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On Appeal from the 270th District Court
Harris County, Texas
Trial Court Case No. 2008-61807

MEMORANDUM OPINION

This is an appeal from a summary judgment in favor of Home State Mutual Insurance Company, Paragon Insurance Company, and Paragon Insurance Group. A trial court awarded Edward McDonald damages on his claim against Francisco

Rangel for injuries McDonald sustained when Rangel struck him with a car. In the case underlying this appeal, McDonald, as Rangel's assignee, sued Rangel's insurers alleging that they had violated their common-law *Stowers* duty and their statutory duty to attempt to settle his claim in good faith. The insurers argued that McDonald's settlement demand did not impose a duty under *Stowers* because it did not address an existing hospital lien nor was it sufficient to trigger their statutory duty to attempt settlement in good faith. The trial court resolved the parties' competing motions for summary judgment in favor of the insurers, and McDonald appealed.

In three issues, McDonald argues that an offer to release the hospital lien was implied in the settlement demand letter and that the summary-judgment evidence conclusively established his right to recover on both his common-law and statutory causes of action. We conclude that there was no implied offer to release the hospital lien and the summary-judgment evidence conclusively negated at least one element of each of McDonald's causes of action. Therefore, we affirm.

I. Background

On August 4, 2001, McDonald was struck by Rangel's vehicle while he was walking in the grass along a service road. *Rangel v. Robinson*, No. 01-05-00318-CV, 2007 WL 625042, at *1 (Tex. App.—Houston [1st Dist.] March 1, 2007, pet.

denied) (mem. op.). As a result, McDonald suffered serious injuries. *Id.* McDonald was taken directly to Memorial Hermann Hospital for treatment.

Memorial Hermann filed a "Notice of Hospital Lien" stating that the accident occurred on August 5, 2001, and McDonald was admitted to the hospital not later than 72 hours after the accident. It further recited, "The name of the person alleged to be liable for damages arising from the injury is any and all responsible parties. The lien is for the amount of the hospital charges for services provided to the injured individual during the first 100 days of the injured individual's hospitalization."

Rangel was insured by Home State, and the Paragon entities managed the adjustment of the claim. At oral argument, all parties agreed that the three appellants were similarly situated for the purposes of this appeal. After the hospital filed the lien, McDonald's attorney wrote to Paragon's adjuster, informing him that McDonald was represented by counsel. The attorney sent Paragon a settlement demand letter dated June 5, 2002. The letter stated a deadline for accepting the demand of June 14, 2002. The front page included the following notice:

NOTICE

> THIS CORRESPONDENCE CONTAINS A SETTLEMENT OFFER WITH RESPECT TO THE ABOVE-REFERENCED CLAIM. PLEASE BE ADVISED, PURSUANT TO THE TERMS HEREIN, THERE IS A TIME LIMIT WITHIN WHICH PARAGON

> INSURANCE GROUP MAY ACCEPT THIS SETTLEMENT OFFER. THE SETTLEMENT OFFER EXTENDED HEREIN IS THE TYPE WHICH IS COMMONLY KNOWN AS A "STOWERS" OFFER. *See, G.A. Stowers Furniture Co. v. American Indemnity Co.*, 15 S.W.2d 544 (Tex. Comm. App. 1929, holding approved); *American Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842 (Tex. 1994). PLEASE TAKE NOTICE, IN THE EVENT THAT PARAGON INSURANCE GROUP FAILS TO ACCEPT THIS SETTLEMENT OFFER BY 5:00 P.M. ON FRIDAY JUNE 14, 2002, THIS SETTLEMENT OFFER WILL BE DEEMED TO HAVE BEEN REJECTED BY PARAGON INSURANCE GROUP. FURTHERMORE, ANY COUNTER-OFFER SUBMITTED ON BEHALF OF PARAGON INSURANCE GROUP'S INSURED WILL BE DEEMED AS A REJECTION OF THIS SETTLEMENT OFFER.

After explaining the basis for the demand, the letter stated that full and final settlement of McDonald's claims could be made "in exchange for payment to Edward McDonald" of the "total amount of liability insurance available to cover your insured in this matter." The demand specified that the payment to McDonald was to be made "care of the undersigned attorney."

While investigating McDonald's claim, the adjuster called the known health-care providers and learned of the existence of at least one purported hospital lien. The day before the settlement demand expired, the adjuster received a letter from counsel for Memorial Hermann Hospital advising him that the hospital had filed a notice of hospital lien and that McDonald's current incurred expenses were $26,150.25. However, the adjuster testified by deposition that, based on his review of the medical records and billing statements, he understood that McDonald's

medical expenses exceeded $54,000 at that time. Nothing in the record demonstrates that the adjuster or his supervisor saw the actual notice of lien at that time. On Friday, June 14, 2002, the adjuster called the office of McDonald's attorney and left a message with the receptionist offering to settle the claim for the full amount of Rangel's insurance policy limits and asking to speak to the attorney handling the case. Nobody returned his phone call.

Three days later, McDonald's attorney wrote to Paragon, asserting that Paragon had breached its *Stowers* duty and stating that there would be no further settlement negotiations. Nevertheless, in late June and early July, Paragon offered to settle McDonald's claim for the full policy limits. The July settlement offer required McDonald to sign a document expressly releasing the hospital lien. McDonald did not accept these settlement offers.

In 2004, the case was tried to the court, and the trial court awarded McDonald $828,453.71 in actual damages and $500,000 in exemplary damages. In 2008, McDonald obtained an order turning over Rangel's right to sue his insurers for failure to settle with McDonald, including any *Stowers* claim. Less than a month later, McDonald filed the suit that is the basis of this appeal.

The insurers and McDonald filed competing motions for summary judgment. McDonald argued that the insurers breached their statutory and common-law duties to Rangel regarding settlement because the settlement demand

implied a release of the hospital lien and, in any event, the lien was facially invalid. Thus, McDonald reasoned, the insurers had been presented with a settlement demand, within policy limits, that a reasonably prudent insurer would have accepted under the circumstances. The insurers argued that they had no duty to determine the validity of the hospital lien and that the settlement demand was not such as a reasonably prudent insurer would have accepted because it did not address resolution of the hospital lien. The trial court resolved the competing motions in favor of the insurers, and McDonald appealed. On appeal, the parties reurge the arguments made in the trial court.

II. Standard of review

We review de novo the trial court's ruling on a motion for summary judgment. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). When both sides move for summary judgment and the trial court grants one motion and denies the other, we review the summary-judgment evidence presented by both sides and determine all questions presented. *Mann Frankfort Stein & Lipp Advisors*, 289 S.W.3d at 848; *Comm'rs Court of Titus County v. Agan*, 940 S.W.2d 77, 81 (Tex. 1997). In such a situation, we render the judgment as the trial court should have rendered. *Mann Frankfort Stein & Lipp Advisors*, 289 S.W.3d at 848; *Agan*, 940 S.W.2d at 81.

The party moving for traditional summary judgment bears the burden of showing that no genuine issue of material fact exists and that it is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *see also Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 215–16 (Tex. 2003). A plaintiff moving for summary judgment must conclusively prove all essential elements of its claim. *See Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). A matter is conclusively established if reasonable people could not differ as to the conclusion to be drawn from the evidence. *See City of Keller v. Wilson*, 168 S.W.3d 802, 816 (Tex. 2005). If the movant meets its burden, the burden then shifts to the nonmovant to raise a genuine issue of material fact precluding summary judgment. *See Centeq Realty, Inc. v. Siegler*, 899 S.W.2d 195, 197 (Tex. 1995). The evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary-judgment evidence. *Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007). A defendant moving for summary judgment must conclusively negate at least one essential element of each of the plaintiff's causes of action or conclusively establish each element of an affirmative defense. *Sci. Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

III. Insurer's obligations regarding settlement of claims

A. The *Stowers* doctrine

In Texas, insurers have a common-law duty to exercise ordinary care in the settlement of claims to protect their insureds against judgments in excess of policy limits. *See Phillips v. Bramlett*, 288 S.W.3d 876, 879 (Tex. 2009); *Stowers Furniture Co. v. Am. Indem. Co.*, 15 S.W.2d 544 (Tex. Comm'n App. 1929, holding approved). "The *Stowers* doctrine shifts the risk of an excess judgment from the insured to the insurer by subjecting an insurer to liability for the wrongful refusal to settle a claim against the insured within policy limits." *AFTCO Enters., Inc. v. Acceptance Indem. Ins. Co.*, 321 S.W.3d 65, 69 (Tex. App.—Houston [1st Dist.] 2010, pet. denied). "[S]hifting the risk of an excess judgment onto the insurer is not appropriate unless there is proof that the insurer was presented with a reasonable opportunity to settle within policy limits." *Rocor Int'l, Inc. v. Nat'l Union Fire Ins. Co.*, 77 S.W.3d 253, 263 (Tex. 2002) (citing *Am. Physicians Ins. Exch. v. Garcia*, 876 S.W.2d 842, 849 (Tex. 1994)). Thus a settlement demand triggers an insurer's *Stowers* duty to respond if: (1) the claim against the insured is within the scope of coverage; (2) the demand is within policy limits; and (3) the terms of the demand are such that an ordinarily prudent insurer would accept it, considering the likelihood and degree of the insured's potential exposure to an excess judgment. *Phillips*, 288 S.W.3d at 879, *AFTCO Enters.*, 321 S.W.3d at 69.

"As a threshold matter, 'a settlement demand must propose to release the insured fully in exchange for a stated sum of money.'" *Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489, 491 (Tex. 1998) (quoting *Texas Farmers Ins. Co. v. Soriano*, 881 S.W.2d 312, 314 (Tex. 1994)).

"In the context of a *Stowers* lawsuit, evidence concerning claims investigation, trial defense, and conduct during settlement negotiations is necessarily subsidiary to the ultimate issue of whether the claimant's demand was reasonable under the circumstances, such that an ordinarily prudent insurer would accept it." *Garcia*, 876 S.W.2d at 849. "Given the tactical considerations inherent in settlement negotiations, an insurer should not be held liable for failing to accept an offer when the offer's terms and scope are unclear or are the subject of dispute." *Rocor Int'l*, 77 S.W.3d at 263.

B. Statutory duty to attempt settlement

Insurers in Texas also have a statutory duty "to attempt in good faith" to effectuate "prompt, fair, and equitable settlement" of claims for which the insurer's liability has become reasonably clear. TEX. INS. CODE ANN. § 541.060(a)(2)(A) (West 2009). An insurer's statutory duty to attempt settlement is not triggered until the claimant presents the insurer with a settlement demand that is within policy limits and that an ordinarily prudent insurer would accept. *Rocor Int'l*, 77 S.W.3d at 262. "A proper settlement demand generally must propose to release the

insured fully in exchange for a stated sum, although it may substitute the 'policy limits' for that amount." *Id.* Thus an insurer's liability becomes reasonably clear and triggers a statutory duty to attempt settlement when (1) the policy covers the claim, (2) the insured's liability is reasonably clear, (3) the claimant has made a proper settlement demand within policy limits, and (4) the demand's terms are such that an ordinarily prudent insurer would accept it. *Id.*

IV. Hospital liens

Since 1933, the Texas Hospital Lien Law has provided a mechanism for hospitals to recover costs incurred in treating people injured in accidents. *See Members Mut. Ins. Co. v. Hermann Hosp.*, 664 S.W.2d 325, 326 (Tex. 1984); TEX. PROP. CODE ANN. §§ 55.001–.008 (West 2007). "The purpose of the act was to encourage hospitals to provide immediate care and treatment to persons injured in accidents, and to compensate hospitals for the vast sums of money being lost when treating patients who were unable to pay." *Members Mut. Ins. Co.*, 664 S.W.2d at 326. "A hospital has a lien on a cause of action or claim of an individual who receives hospital services for injuries caused by an accident that is attributed to the negligence of another person." TEX. PROP. CODE ANN. § 55.002(a).

A hospital lien attaches to (1) a cause of action for damages arising from the injury for which the person received treatment, (2) a judgment of a court or a decision of a public agency in a proceeding to recover damages arising from the

injury, and (3) the proceeds of a settlement of a cause of action or claim arising from the injury. *Id.* § 55.003. A hospital may secure a lien by filing a notice with the county clerk in the county where the medical services were provided. *Id.* § 55.005. The notice must state (1) the injured person's name and address, (2) the date of the accident, (3) the name and location of the hospital claiming the lien, and (4) the name of the person alleged to be liable for damages arising from the injury, if known. *Id.* A lien is discharged by the filing of a certificate stating that the debt covered by the lien has been paid or released. *Id.* § 55.006. A release of a cause of action to which a hospital lien has attached is not valid unless:

> (1) the charges of the hospital . . . claiming the lien were paid in full before the execution and delivery of the release;
>
> (2) the charges of the hospital . . . were paid before the execution and delivery of the release to the extent of any full and true consideration paid to the injured individual by or on behalf of the other parties to the release; or
>
> (3) the hospital . . . is a party to the release.

Id. § 55.007. A hospital has a cause of action against those who pay or receive money in derogation of the hospital's rights under the Texas Hospital Lien Law. *See Bashara v. Baptist Mem'l Hosp. Sys.*, 685 S.W.2d 307, 309 (Tex. 1985).

V. Analysis

A. Common-law duty to settle

McDonald contends that the demand letter proposed a full and final settlement adequate to trigger the insurer's *Stowers* duty to settle because a release of the hospital lien was implicit in the demand letter. He argues that the insurer's representatives did not speak with anyone about obtaining a release before the demand expired on June 14, 2002, and they did not mention a release when settlement was attempted after the deadline passed. McDonald also argues that the evidence supports the allegedly implied term because the adjuster repeatedly testified that it is standard practice to obtain a full release in settling a personal injury claim. McDonald argues that use of the words "settlement purposes" was sufficient to communicate that a full release, including the hospital lien, was being offered in exchange for settlement. Finally, he suggests that the hospital lien was facially invalid because the date of the accident was incorrect, McDonald's address on the lien was different from that on the police report, and it did not identify a responsible party.

The insurers rely on *Trinity Universal Ins. Co. v. Bleeker*, 966 S.W.2d 489, (Tex. 1998), for the proposition that an offer to settle is not a sufficient *Stowers* demand unless it expressly acknowledges existing hospital liens and offers the insured a release from them. In *Bleeker*, the insured was drunk when he drove into

a pickup truck that was stopped on the side of the road, killing one person and injuring 13 others. 966 S.W.2d at 490. Medical bills exceeded the limits of the insurance policy, and the treating hospitals filed hospital liens. *Id.* An attorney representing 5 of the 14 claimants demanded that the insurer pay the full policy limits into the court's registry for distribution to his clients and the other 9 claimants. *Id.* The demand letter mentioned the *Stowers* doctrine and threatened a lawsuit if the insurer did not meet the demand. *Id.* It did not explicitly offer to release any claims against the insured, nor did it mention the hospital liens. *Id.*

The Texas Supreme Court first observed that the settlement demand could not have offered a full and final release for the insured because the attorney did not represent all of the claimants. *Id.* at 491. The Court then held that the insurers never had a *Stowers* duty to settle because a full release had never been offered. *Id.* Because the offers did not include the hospital liens, any implied release included in the settlement demand was not a full one under the Texas Hospital Lien Law. *Id.*

Here, the settlement demand referred to the *Stowers* doctrine and stated that McDonald had authorized his attorney "to fully and finally settle his claims" against Rangel. It did not explicitly offer to release any potential claims against Rangel, nor did it make any reference to the resolution of hospital liens. Before the settlement offer expired, Memorial Hermann notified the insurer that it intended to

assert its rights under the lien. Memorial Hermann could not have been a payee on a check in acceptance of the settlement offer because the demand specifically required payment to be made directly to McDonald, care of his attorneys, and that any counteroffer would constitute a rejection of the opportunity to settle. These express instructions in the settlement demand subjected the insurer to a risk that a settlement on the offered terms would not be a full one. *Cf. Bleeker*, 966 S.W.2d at 491.

McDonald contends that the insurers' failure to mention the necessity of a release of the hospital lien before June 14, 2002 or in some of their subsequent correspondence shows that they understood that the release was implied in the settlement demand. Evidence about the insurers' claims investigation and conduct during settlement negotiations is "necessarily subsidiary to the ultimate issue" of whether McDonald's demand itself was such that an ordinarily prudent insurer would accept it. *Garcia*, 876 S.W.2d at 849. Moreover, the failure to mention hospital liens in subsequent correspondence does not indicate that the insurers would not have required protection from liens in any formal documentation of a settlement—none of the insurers' communications were framed in the take-it-or-leave-it manner of McDonald's exploding demand letter. Accordingly, we conclude that in this case there was neither an express nor an implied offer to release the hospital lien in McDonald's settlement demand.

McDonald also asserts that his demand letter offered the insurers an opportunity for a full and final resolution of his claim because the hospital lien was legally invalid. His contentions of the lien's legal invalidity are based upon allegations that it incorrectly showed an accident date of August 5 instead of August 4, it showed an allegedly incorrect address for McDonald, and it did not name Rangel as the responsible party. The record shows that the adjuster was aware of the existence of a purported hospital lien before the settlement demand expired, but it does not indicate whether the insurers saw the actual lien. We conclude, however, that the validity of the lien itself is irrelevant to whether the demand letter triggered a *Stowers* duty.

As discussed above, the terms of McDonald's settlement demand included neither express nor implied protections against hospital liens. To the extent the demand was intended to invoke the *Stowers* doctrine, its terms should have either made express reference to the liens or at least should not have instructed express terms for acceptance which left the insurer exposed to the risk of liability to the hospital. *See Bleeker*, 966 S.W.2d at 491. McDonald's demand letter therefore failed to propose reasonable terms such that an ordinarily prudent insurer would have accepted them and assumed for itself the risk that the liens would be enforced. *See Phillips*, 288 S.W.3d at 879.

Finally, McDonald argues that even if the demand letter was insufficient to trigger a duty to settle, the insurers in fact attempted to settle and should therefore be held liable for failing to exercise reasonable care in doing so. McDonald contends that the insurer failed to exercise due care because its offers of settlement came after the demand letter's arbitrary deadline for acceptance. These arguments are not supported by the record, which shows that the insurers offered to settle in exchange for a full release. In addition, McDonald's argument implies an additional common-law duty regarding settlement, separate from the *Stowers* doctrine. No such duty exists in Texas law. *See Mid-Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 776 (Tex. 2007) (confirming "*Stowers* is the only common-law tort duty in the context of third-party insurers responding to settlement demands").

We overrule McDonald's first and second issues.

B. Statutory duty to settle

In his third issue, McDonald argues that the trial court should not have granted the insurers' motions for summary judgment because the evidence conclusively established their liability under his statutory cause of action. Like the *Stowers* cause of action, the statutory cause of action includes the element that the terms of the settlement must be such that an ordinarily prudent insurer would accept it. *Rocor Int'l*, 77 S.W.3d at 262. Had the insurers accepted McDonald's

demand, they and Rangel could have been liable to the hospital under the Texas Hospital Lien Law. *See Bashara*, 685 S.W.2d at 309; *Borders*, 581 S.W.2d at 733. As discussed above, such terms were not reasonable ones that an ordinarily prudent insurer would have accepted. *See Rocor Int'l*, 77 S.W.3d at 262.

We overrule McDonald's third issue.

CONCLUSION

We affirm the trial court's judgment.

Michael Massengale
Justice

Panel consists of Justices Keyes, Sharp, and Massengale.