Opinion issued December 29, 2011

In The

Court of Appeals

For The

First District of Texas

NO. 01-10-00946-CV

OFFSHORE RECRUITING SERVICES, INC., Appellant

V.

NEW HAMPSHIRE INSURANCE COMPANY, LLOYD'S OF LONDON SYNDICATE # 724, LLOYD'S OF LONDON SYNDICATE # 2724, LLOYD'S OF LONDON SYNDICATE # 1183, LLOYD'S OF LONDON SYNDICATE # 2183, LONDON AND EDINBURGH INSURANCE COMPANY LTD., AND AXA GLOBAL RISKS (UK) LTD., Appellees

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On Appeal from the 269th District Court
Harris County, Texas
Trial Court Cause No. 2008-75676

MEMORANDUM OPINION

Appellant, Offshore Recruiting Services, Inc. ("Offshore"), challenges the trial court's rendition of summary judgment in favor of appellees, New Hampshire Insurance Company, Lloyds's of London Syndicate # 724, Lloyds's of London Syndicate # 2724, Lloyds's of London Syndicate # 1183, Lloyds's of London Syndicate # 2183, London and Edinburgh Insurance Company Ltd., and AXA Global Risks (UK) Ltd. (collectively, "the London Insurers"), in Offshore's suit against the London Insurers for breach of contract, violations of the Texas Insurance Code, violations of the Texas Deceptive Trade Practices Act,[1] civil conspiracy, and fraud. In seven issues, Offshore contends that the trial court erred in granting the London Insurer's summary judgment motion on all of its causes of action.

We affirm.

Background

Petrodrill Engineering N/V, Inc. ("Petrodrill"), which managed the construction and commissioning of six offshore oil drilling units, entered into an agreement with Offshore for Offshore to provide Petrodrill with personnel for a Petrodrill-managed semi-submersible drilling vessel construction project (the

[1] *See* TEX. BUS. & COM. CODE ANN. §§ 17.41–.63 (Vernon 2011).

"Personnel Agreement"). The Personnel Agreement required Offshore to maintain with Lombard Canada Limited ("Lombard") an "Employers Liability Insurance" policy (the "Lombard Policy"), and it required Offshore and Petrodrill to "indemnify, defend, and hold the other harmless from and against any and all claims, losses, costs, damages and expenses . . . in respect of injury to . . . or death of any person employed by itself or its other contractors or subcontractors . . . arising out of or in connection with" the Personnel Agreement.

During the construction project, an accident occurred in which one Offshore worker was killed and two Offshore workers were injured. The injured workers and the estate of the deceased worker sued Petrodrill, and it requested that Offshore, pursuant to the indemnity provision in the Personnel Agreement, defend it against the workers' claims. Offshore refused, and Petrodrill, after it later settled the workers' claims for $912,000, sued Offshore in a Maine court for indemnification for the settlement amounts and its legal expenses.[2] Offshore challenged the jurisdiction of the Maine court, contending that Petrodrill's claim was subject to arbitration, and Petrodill submitted its indemnification claim to arbitration in England.

[2] In its petition in the instant action, Offshore alleged that the London Insurers paid the settlement funds and, thus, the claim filed against it by Petrodrill in Maine, along with the subsequent arbitration, constituted a subrogation action brought by the London Insurers against Offshore. The arbitration award order refers to Petrodrill as the claimant.

In the arbitration, Offshore disputed that the indemnity provision applied and it had "employed" the injured and deceased workers within the meaning of the Personnel Agreement's indemnity provision. However, the arbitrator disagreed and issued a detailed award order, concluding that Petrodrill was entitled to indemnification for the settlement amounts pursuant to the indemnity provision in the Personnel Agreement.

Within the award order, the arbitrator also addressed an application to amend that Offshore had filed during the arbitration proceedings. The arbitrator noted that Offshore had asserted in its application that it was entitled to insurance coverage under a "general maritime and construction liability insurance policy" issued by the London Insurers to Petrodrill. The London Policy identified Petrodrill as the "Principal Assured" and described "Additional Insureds" and "Other Assureds." Offshore contended that it qualified as a "co-assured" under the London Policy and the London Insurers had waived their subrogation rights against it. The arbitrator did not directly address the merits of Offshore's arguments. Instead, the arbitrator concluded that Offshore's application to amend was made "too late," Offshore could have sought application of the London Policy earlier in the arbitration proceedings, there was "no evidence that [the London Policy] would have been refused," and the "lateness" of Offshore's application could not be "justified" on the basis of discovery complaints made by Offshore. Thus, the

arbitrator denied Offshore's application to amend.

After the entry of the arbitration award, Offshore sent to the London Insurers a letter, demanding that they defend and indemnify it against the claims made by Petrodrill in the arbitration on the basis that Offshore was an "additional insured" under the London Policy. Subsequently, Offshore filed, against the London Insurers, the instant suit, alleging that they had breached the London Policy by bringing, through Petrodrill, the arbitration proceeding against it for indemnification of the settlement amounts. In support of its breach-of-contract action, Offshore alleged that it qualified as an "Assured" or "Other Assured" under the London Policy. It also alleged that the London Insurers breached the London Policy by not defending and indemnifying it against Petrodrill's claim and instituting the "subrogation action" (i.e., the arbitration proceeding) against Offshore in violation of the waiver-of-subrogation-rights provision in the London Policy. In support of its civil-conspiracy claim, Offshore alleged that the London Insurers had conspired to deny it assured status. In support of its Texas Insurance Code and fraud claims, Offshore alleged that the London Insurers had breached their prompt-pay duties, engaged in unfair settlement practices, misrepresented the terms of the London Policy, and violated their duty to disclose or not fraudulently conceal certain information. Offshore asserted that the arbitrator had not "adjudicated" its "defenses" in the arbitration proceeding, and, at the end of its

petition, noted that Lombard, its insurer, had "paid the arbitration award and damages" and was the real party in interest.

The London Insurers moved for summary judgment, arguing that the Personnel Agreement required Offshore to procure employer's liability insurance, the London Policy was "excess to any other insurance in existence with respect to [Offshore's] liability under the Personnel Agreement," Lombard fully indemnified Offshore for the arbitration award so there was "no excess judgment" to which the London Policy could be applied, the London Policy did "not respond" to Offshore's claims, and Offshore "lack[ed] standing" because the London Policy provided that "Other Assureds" could only exercise their rights "with the privity of and through the Principal Assured [Petrodrill]" and Petrodrill was "in no way involved" in Offshore's claim. The London Insurers also argued that because Lombard fully indemnified Offshore, there were no longer any claims to which Lombard could subrogate. And they argued that Offshore's "derivative claims" failed because the London Policy did not cover Offshore and they did not owe Offshore any duty to inform it of the existence of the London Policy.

In the summary-judgment proceedings, the parties focused almost exclusively on the relevant language of the Personnel Agreement, which is set forth above, and the relevant policy provisions of the London Policy, which are set forth below. The London Policy, which identified the "Principal Assured" as

Petrodrill, provided that, with regard to "third party liabilities," the London Insurers would "indemnify the Assured for all sums . . . imposed upon the Assured by law" or "assumed under contract or agreement" for "damages on account of" personal injuries. It further described "Other Assureds" as follows:

> [2.] OTHER ASSUREDS
>
> (3) Any other company, firm, person or party (including but not limited to contractors and/or sub-contractors and/or suppliers) with whom the Assured(s) . . . have entered into written contract(s) in connection with the subject matters of this Insurance, and/or any works activities, preparations connected therewith.
>
> The interests of the "Other Assured(s)" shall be covered throughout the entire Policy Period (irrespective of contract period(s)) subject to full coverage as herein, *unless specific contract(s) contain provisions to the contrary, in which event, insurance hereunder for such specific contract(s) only, shall be limited accordingly*.
>
> The foregoing shall not operate to increase the Limit(s) of Liability contained herein or to prevent a claim settlement to any Principal Assureds otherwise recoverable but for this paragraph.
>
> The rights of "Other Assureds" under this Policy may only be exercised *with the privity of and through the Principal Assured hereon*.[3]

(Emphasis added.) In a section detailing the policy period, the London Policy

[3] In addition to designation of "Other Assureds," the London Policy provided that "any individual firm or corporation . . . for whom or with whom the Assured may be operating is . . . an Additional Assured when required by contract." Offshore does not contend that it qualifies as an Additional Assured.

provided,

> The interest of "Other Assured(s)" shall be covered throughout the entire Policy Period (irrespective of contract period(s) subject to full coverage as herein, unless specific contract(s) contain provisions to the contrary, in which event, Insurance hereunder for such specific contract(s) only, shall at the Principal Assured's option be limited accordingly. *In accordance with the above this Insurance shall be deemed to have benefit of and only respond for amounts not recovered from or payable by other insurance required by contract of "Other Assured(s)" as defined in Article 2.(3).* The foregoing shall not operate to Increase the Limit(s) of Liability contained herein.

(Emphasis added.) In a section entitled "Subrogation," the policy provided,

> Underwriters agree to waive rights of subrogation against any Assured and any person, company or corporation *whose interests are covered by this Policy* and against any Employee, agent or contractor of the Principal Assureds or any Individual, (including visitors) agent, firm, affiliate or corporation for whom the Principal Assureds may be acting or with whom the Principal Assureds may have agreed prior to any loss to waive subrogation, ...

(Emphasis added). Finally, in a section entitled "Other Insurance," the policy provided,

> Furthermore with regard to liability coverage under this [section] to "Other Assureds" it is understood and agreed that *where separate Policy(ies) may be in existence in respect of "Other Assureds" as defined in Article 2. (3) the amount of cover required by contract shall be deemed to be underlying*.

(Emphasis added.) The trial court granted the London Insurers' summary judgment motion, dismissing all of Offshore's claims.

Standard of Review

To prevail on a summary-judgment motion, a movant has the burden of proving that it is entitled to judgment as a matter of law and there is no genuine issue of material fact. TEX. R. CIV. P. 166a(c); *Cathey v. Booth*, 900 S.W.2d 339, 341 (Tex. 1995). When a defendant moves for summary judgment, it must either (1) disprove at least one essential element of the plaintiff's cause of action or (2) plead and conclusively establish each essential element of its affirmative defense, thereby defeating the plaintiff's cause of action. *Cathey*, 900 S.W.2d at 341; *Yazdchi v. Bank One, Tex., N.A.*, 177 S.W.3d 399, 404 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). When deciding whether there is a disputed, material fact issue precluding summary judgment, evidence favorable to the non-movant will be taken as true. *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548–49 (Tex. 1985). Every reasonable inference must be indulged in favor of the non-movant and any doubts must be resolved in its favor. *Id*. at 549.

Breach of Contract

In its first five issues, Offshore argues that the trial court erred in granting the London Insurers summary judgment on its breach-of-contract claim because it qualified as an "Other Assured" under the London Policy, the London Policy was ambiguous and the trial court was required to accept its "reasonable interpretation," the London Insurers "presented no facts to support a reasonable

meaning of the language" of the London Policy, and the London Insurers breached the London Policy by failing to indemnify Offshore against the arbitration claim and by violating the "waiver of subrogation" provision. Offshore also argues that the trial court erred to the extent that it granted summary judgment on the ground of res judicata because the London Insurers raised this argument for the first time in their summary-judgment reply and res judicata does not apply to bar its claims. Offshore further argues that the trial court erred to the extent that it granted summary judgment on the ground that the London Policy was "excess" to the Lombard Policy because the London Insurers failed to provide any evidence of the terms of the Lombard Policy, there were "material fact issues" as to whether the London Policy provided excess coverage, and the London Policy and the Lombard Policy "covered different risks, rendering the 'other insurance' clause [in the London Policy] inapplicable." Finally, Offshore argues that the trial court erred to the extent that it granted summary judgment on the ground that Lombard had already paid the arbitration claim and there was no remaining claim to which Lombard, the real party in interest, could subrogate.

The London Insurers assert that Offshore lacked standing under the London Policy, the Lombard Policy was "underlying" the London Policy, and Offshore's claims are barred because Lombard already fully indemnified it.

We interpret an insurance policy according to general rules of contract

construction to ascertain the parties' intent. *Gilbert Tex. Const., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010); *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 23 (Tex. 2008). We first look to the language of the policy because we presume that parties intend what the words of their contract say. *Gilbert Tex. Const., L.P.*, 327 S.W.3d at 126. We examine the entire policy and seek to harmonize and give effect to all provisions so that none will be meaningless. *Id*. We give the policy's terms their ordinary and generally-accepted meaning unless the policy shows that the terms were used for a technical or different sense. *Id*. Where the language is plain and unambiguous, we must enforce the policy as made by the parties, and we "cannot make a new contract for them, nor change that which they have made under the guise of construction." *Fiess v. State Farm Lloyds*, 202 S.W.3d 744, 753 (Tex. 2006).

Whether a contract is ambiguous is itself a question of law. *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003). An ambiguity does not arise simply because the parties offer conflicting interpretations. *Gilbert Tex. Const., L.P.*, 327 S.W.3d at 133. Rather, an ambiguity exists only if the policy language is susceptible to two or more reasonable interpretations. *Am. Mfrs. Mut. Ins. Co.*, 124 S.W.3d at 157. If the policy language is susceptible to more than one reasonable interpretation, the interpretation that most favors coverage will be adopted. *Gilbert Tex. Const., L.P.*, 327 S.W.3d at 133.

Assuming that Offshore may qualify as an "Other Assured" under the London Policy,[4] the London Policy contains three separate provisions plainly indicating that coverage for an other assured is limited in the event that the other assured was contractually required to obtain other applicable coverage. The first limiting provision in the London Policy is the "Other Assureds" provision, which expressly provides that other assureds are entitled to coverage "unless specific contract(s) contain" contrary provisions. The provision provides that, in such an event, insurance available under the London Policy will be "limited accordingly." The second limiting provision is the "Period" provision, which provides that other assureds are entitled to coverage "unless specific contract(s) contain" contrary provisions. The provision provides that, in such an event, insurance under the London Policy "shall" be "limited accordingly," and at the "Principal Assured's option." The Period provision goes even further, expressly providing that "[i]n accordance with the above," insurance under the London Policy "shall . . . only respond for amounts not recovered from or payable by other insurance" policies that are "*required by contract* of 'Other Assureds,'" as that term is defined in the London Policy. (Emphasis added.) The third limiting provision is the "Other

[4] The London Insurers did not challenge, for summary-judgment purposes, that Offshore could be considered an other assured in certain circumstances. Rather, they contended that, under the circumstances presented, Offshore was not entitled to any coverage under the London Policy.

Insurance" provision, which provides that when a separate policy exists "in respect of Other Assureds," as that term is defined in article 2.3, the "amount of cover[age] *required by contract* shall be deemed to be underlying." (Emphasis added.) In addition to these three limiting provisions, the London Policy specifically states that "Other Assureds" may exercise their rights under the London Policy only with "the privity of and through the Principal Assured," Petrodrill.

Here, it is undisputed that the Personnel Agreement, which contained an indemnity provision, required Offshore to maintain $5 million in insurance coverage under the Lombard Policy. In the prior arbitration proceeding, the arbitrator concluded that the workers who were injured and killed were employees of Offshore and the Personnel Agreement's indemnity provision required Offshore to indemnify Petrodrill for the amounts that it paid to settle the workers' claims. Offshore did not attempt to challenge these arbitration findings, nor could it in the instant proceeding. It is also undisputed that Offshore's insurer, Lombard, fully indemnified Offshore for the settlement amounts that the arbitrator ordered it to pay pursuant to the Personnel Agreement's indemnity provision.

We conclude, based upon the unambiguous language of the London Policy, that Offshore was not entitled to seek indemnification as an "Other Assured" from the London Insurers for the amounts its insurer, Lombard, paid pursuant to Personnel Agreement's indemnity provision and in compliance with the

arbitrator's order. The only reasonable interpretation of the London Policy is that, assuming that Offshore could qualify as an other assured, any coverage for Offshore was potentially available only for any amount in excess of any applicable insurance that Offshore was contractually obligated to obtain. The London Policy provided that, under the circumstances presented, the coverage under the Lombard Policy was "underlying" and the London Policy would only "respond" to amounts not covered by Offshore's Policy. The Lombard Policy was applicable because, as Offshore admits, Lombard paid the amounts that it sought to recover in the instant proceeding.

This interpretation is supported by the London Policy's provision that an other assured could exercise its rights with the "privity of" and "through" Petrodrill. Petrodrill asserts that this language should be interpreted to mean that Offshore may not seek policy benefits without Petrodrill's agreement. Offshore counters that this language simply refers to the parties' original contractual agreement, i.e., the Personnel Agreement, and that the necessary privity exists. Petrodrill's interpretation is consistent with the three limiting provisions of the London Policy. Offshore's interpretation ignores the fact that we are required to read the London Policy as a whole and that we should read provisions in context with the entire policy. *See Gilbert Tex. Const., L.P.*, 327 S.W.3d at 133 (noting that court should interpret policy exclusion "in context" with other policy terms).

Moreover, in almost every conceivable instance, Offshore's interpretation would render this language a nullity. We are to interpret the policy in a manner that harmonizes and gives effect to all provisions so that none are meaningless. *Id*.

Offshore argues that we cannot interpret the London Policy as excess or the Lombard Policy as "underlying" because the Lombard Policy covers different risks than the London Policy and Texas case law provides that, when policies cover different risks, "Other Insurance" provisions are inapplicable. First, Offshore's argument ignores the undisputed fact that Lombard has already paid the amounts that Offshore now seeks to recover. Second, even if the undisputed fact of payment was not controlling, Offshore's argument on the effect of the "Other Insurance" provision and its discussion of the general applicability of Other Insurance clauses[5] does not address the specific language of the London Policy and the "Other Insurance" provision in this case. As we have noted above, the London Policy contains, in three separate instances, limiting provisions that make clear that, in the event an "Other Assured" is contractually obligated to obtain insurance, any applicable insurance applies first and effects coverage available under the London Policy. Third, the "Other Insurance" provision in this case makes express reference to the amount of coverage for policies existing as "required by contract,"

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[5] *See, e.g., Hartford Cas. Ins. Co. v. Executive Risk Specialty Ins. Co.*, No. 05-03-00546-CV, 2004 WL 2404382, at *2 (Tex. App.—Dallas Oct. 28, 2004, pet. denied) (mem. op.) (discussing "Other Insurance" provisions).

and it states that these amounts "shall be deemed to be underlying." This provision is unambiguously referring to the Lombard Policy obtained by Offshore that has paid the claims at issue. In sum, when reading the entire London Policy, the only reasonable interpretation is that the Lombard Policy that Offshore was contractually obligated to obtain, and that had already paid the claim, applies first, and the London Policy, if it even applies under these circumstances, is excess. As the London Policy states, the Lombard Policy is underlying.

In regard to Offshore's argument that the London Insurers breached the waiver-of-subrogation provision in the London Policy, Offshore has not cited any authority to support its attempt to subsequently bring a wholly separate breach-of-contract lawsuit against the London Insurers for their alleged breach of this provision on the basis that Offshore qualifies as an other assured. Discussion of this issue in Texas case law suggests that a waiver-of-subrogation provision is commonly recognized as supporting an affirmative defense in a subrogation action. *See Travelers Lloyds Ins. Co. v. Dyna Ten Corp.*, No. 2-08-502-CV, 2009 WL 2619232, at *1 (Tex. App.—Fort Worth Aug. 26, 2009, no pet.) (mem. op.) (referring to affirmative defense supported by subrogation waiver); *Lloyd's of London v. Buddy Miller Enters., Inc.*, No. 2-00-200-CV, 2001 WL 34041177, at *6 (Tex. App.—Fort Worth July 19, 2001, no pet.) (reversing summary judgment granted in favor of defendant on "waiver of subrogation affirmative defense); *see*

also Crow-Williams, I v. Fed. Pacific Elec. Co., 683 S.W.2d 523, 525 (Tex. App.—Dallas 1984, no writ) (affirming summary judgment in favor of defendant on basis waiver-of-subrogation provision); Lee R. Russ & Thomas F. Segalla, 16 COUCH ON INSURANCE § 224:5 (2000) (stating that "antisubrogation rule is an affirmative defense"). That the waiver of subrogation provision in this case supports an affirmative defense is illustrated by the fact that Offshore itself attempted to raise this provision as an affirmative defense in the arbitration, even though the arbitrator ultimately determined that it was "too late" and the "lateness" could not be "justified." We conclude that Offshore could have raised the waiver-of-subrogation argument as an affirmative defense in the arbitration, but it does not provide a basis for Offshore to bring a separate claim for affirmative relief in this subsequently filed proceeding.

Moreover, Offshore's attempt to bring a wholly separate cause of action for breach of contract on the basis of the waiver-of-subrogation provision, subsequent to a legal proceeding in which it has already, unsuccessfully attempted to raise this matter as an affirmative defense, would defeat the general purpose of these types of provisions. Waiver-of-subrogation provisions are intended to "eliminate the need for lawsuits" and "avoid[] disruption and disputes among the parties." *Walker Eng'g, Inc. v. Bracebridge Corp.*, 102 S.W.3d 837, 841 (Tex. App.—Dallas 2003, pet. denied) (citation omitted). Permitting Lombard, through its

insured Offshore, to pursue yet another lawsuit arising from the injuries and death of the Offshore employees, after this matter was raised in the arbitration and ultimately rejected for "lateness," would simply continue the history of litigation between these parties.

Here, the Personnel Agreement required Offshore to maintain the Lombard Policy. After the arbitrator concluded that the indemnity provision in the Personnel Agreement required Offshore to indemnify Petrodrill for the settlement amounts paid to the injured and deceased Offshore workers, the Lombard Policy, which was "underlying" the London Policy, paid these amounts. In these circumstances, although the waiver-of-subrogation provision could have been asserted as an affirmative defense in a subrogation action, it does not support the filing of a subsequent lawsuit by Offshore against the London Insurers for a separate breach-of-contract claim.

We conclude that the London Insurers established as a matter of law that they did not breach the London Policy by failing to indemnify Offshore for the amounts that the arbitrator ordered Offshore to pay Petrodrill pursuant to the indemnity provision in the Personnel Agreement. We further conclude that the London Insurers established as a matter of law that they did not breach the London Policy and violate the subrogation provision by bringing the arbitration to enforce the indemnity provision in the Personnel Agreement. Accordingly, we hold that

the trial court did not err in granting summary judgment on Offshore's breach-of-contract claim.

We overrule Offshore's first five issues.

Other Claims

In its sixth and seventh issues, Offshore argues that the trial court erred in granting summary judgment on its remaining claims for violations of the Texas Insurance Code, deceptive trade practices, conspiracy, and fraud because "the basis for the dismissal stems from the erroneous conclusion that Offshore was not entitled to pursue it breach of contract claim." Offshore further argues that the trial court erred in granting summary judgment because the London Insurers "were under a duty pursuant to the disclosure rules in the arbitration proceeding to produce a copy of the [London] Policy and failed to comply with that duty."

Offshore's claims for violations of the Insurance Code and deceptive trade practices, as pleaded, are contingent upon the allegations giving rise to Offshore's breach-of-contract claim. Thus, our prior conclusion that the London Insurers established as a matter of law that they did not breach the London Policy resolves all of these claims.

The only additional matter that is not resolved by our prior holding is Offshore's allegation, made in support of its fraud and conspiracy claim, that the London Insurers committed fraud as a result of failing to timely produce the

London Policy in the arbitration proceedings in England. To the extent that Offshore has alleged that the London Insurers had a duty to disclose to Offshore its potential status as an other assured under the London Policy, the Texas Supreme Court has held that an insurer with knowledge that a suit implicating policy coverage has been filed against its additional insured does not have a duty to inform the additional insured of the available coverage. *Nat'l Union Fire Ins. Co. of Pittsburgh, PA v. Crocker*, 246 S.W.3d 603, 606 (Tex. 2008). And, to the extent that Offshore is seeking to pursue a cause of action against the London Insurers for failing to timely produce the London Policy in the arbitration proceeding, there is no authority that would permit Offshore to pursue affirmative relief for this discovery violation in the instant proceeding.

Accordingly, we hold that the trial court did not err in granting summary judgment on Offshore's remaining claims for violations of the Texas Insurance Code, deceptive trade practices, conspiracy, and fraud.

We overrule Offshore's sixth and seventh issues.

Conclusion

We affirm the judgment of the trial court.

Terry Jennings
Justice

Panel consists of Justices Jennings, Bland, and Massengale.