Opinion issued December 20, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-16-00482-CV

CEVA LOGISTICS U.S., INC. AND CEVA FREIGHT, LLC, Appellants

V.

ACME TRUCK LINE, INC., Appellee

On Appeal from the 129th District Court
Harris County, Texas
Trial Court Case No. 2010-39403

MEMORANDUM OPINION

Appellants, CEVA Logistics, U.S., Inc. and CEVA Freight, LLC (collectively "CEVA"), challenge the trial court's rendition of summary judgment in favor of appellee, Acme Truck Line, Inc. ("Acme"), in CEVA's cross-claim against Acme for "recovery of monetary damages, pursuant to (and in the

alternative) contract, statute, and common law for monies paid" by CEVA in settlement of an underlying action for theft of a shipment of cellular telephones. In one issue, CEVA contends that the trial court erred in granting Acme summary judgment.

We reverse and remand.

Background

In its original petition, Cello Partnership, doing business as Verizon Wireless ("Verizon"), alleged that "[o]n or about June 19 and 20, 2009, a shipment of over 34,000 cellular telephones and related products . . . was delivered" in Fort Worth, Texas to CEVA, Acme, and American Eagle Transport Inc., formerly known as New Horizon Transportation Inc. ("American Eagle") (collectively CEVA, Acme, and American Eagle are referred to as the "defendants"). The defendants were then to deliver the shipment to Memphis, Tennessee on or about "June 20 to June 23, 2009, by motor carriage, for an agreed compensation." However, the shipment "was lost, stolen, and/or converted by the defendants or by others for whose conduct the defendants [were] responsible." And the defendants "failed to deliver" the shipment "as required under the relevant contracts of

carriage and applicable law." As a result of its loss, Verizon suffered damages in the amount of $6,114,563.00.[1]

Verizon sought to recover from CEVA, Acme, and American Eagle its damages resulting from the lost or stolen cellular telephones. CEVA answered Verizon's suit and asserted cross-claims against Acme, the company that CEVA had hired to deliver the cellular telephones, and American Eagle, the company to which Acme had subcontracted the delivery, for contribution and indemnification in the event it was found liable to Verizon for damages related to the stolen goods. Acme then asserted a cross-claim for contribution and indemnity against American Eagle, which, in turn, asserted cross-claims against CEVA and Acme for contribution and indemnity. Verizon settled with CEVA and Acme and assigned its claims against American Eagle to CEVA. Acme and CEVA then filed cross motions for summary judgment on CEVA's cross-claim against Acme.

In its First Amended Motion for Summary Judgment against CEVA, Acme argued that it was entitled to summary judgment on CEVA's cross-claim against it because it, as a matter of law, established (1) CEVA's settlement with Verizon rendered its claims for contribution and indemnity against Acme void; (2) CEVA's theories of recovery based on state law, including negligence, breach of contract,

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[1] In its original petition, Verizon also alleged damages resulting from the loss or theft of a second shipment. These allegations implicated only CEVA and were not at issue between CEVA and Acme in the trial court or in this Court.

breach of warranty, contribution, and indemnity, are pre-empted by the Carmack Amendment[2]; (3) Acme's liability, under the Carmack Amendment, is limited to $1 million, which it satisfied by paying this amount in settlement with Verizon; (4) CEVA has no valid claim for indemnity under the Carmack Amendment; (5) the Agent Carrier Agreement relied upon by CEVA is inapplicable to and unenforceable in this case; (6) even if the Agent Carrier Agreement applies, any inconsistency between that agreement and the Bill of Lading should be resolved in favor of the Bill of Lading under federal law; (7) CEVA's claim for contractual indemnity pursuant to the Agent Carrier Agreement is invalid under state law because it violates the express negligence doctrine; and (8) the indemnity clause in the Agent Carrier Agreement violates the Texas Transportation Code.[3] Acme attached to its motion the Bill of Lading, the Agent Carrier Agreement, the settlement agreement between Acme and Verizon (and Verizon's insurance carrier Allianz), and select pages from the depositions of certain representatives of CEVA and Acme.

In response to Acme's First Amended Motion for Summary Judgment, CEVA argued that Acme was not entitled to summary judgment because: (1) Acme's payment to Verizon did not extinguish its liability to CEVA pursuant to the terms of the Bill of Lading and Agent Carrier Agreement; (2) the express

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2 *See* 49 U.S.C. § 14706 (2018).

3 *See* TEX. TRANSP. CODE ANN. § 623.0155(a) (Vernon 2011).

negligence doctrine does not apply because there has been no negligence finding against CEVA; (3) CEVA prevails regardless of whether the Carmack Amendment applies; (4) CEVA is entitled to indemnity pursuant to the Carmack Amendment; (5) the Agent Carrier Agreement governs Acme's liability to CEVA, not the Bill of Lading and the $1 million limitation of liability therein; and (6) Acme is judicially estopped from denying application of the Agent Carrier Agreement because it has taken the position that it does apply in a separate federal court case. CEVA attached to its response Acme's pleadings in its suits against the insurance company and attorney that represented Acme's interest in its settlement with Verizon, the Agent Carrier Agreement, the Bill of Lading, the Affidavit of Matt Wetzig, Vice President of Operations for CEVA, and CEVA's Terms and Conditions of Service.[4]

On March 2015, the trial court granted Acme's first amended motion for summary judgment on CEVA's cross-claim, denied CEVA's amended motion for summary judgment on that same cross-claim, and ordered that CEVA take nothing on its cross-claim against Acme. CEVA appealed, and we dismissed that appeal for want of jurisdiction because it was not made from a final order.[5]

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[4] CEVA also filed an Amended Cross-Motion for Summary Judgment in regard to Acme's defenses to its cross-claim.

[5] *CEVA Logistics U.S., Inc. v. Acme Truck Line, Inc.*, No. 01-15-00314-CV, 2015 WL 5769996 (Tex. App.—Houston [1st Dist.] Sept. 29, 2015, no pet.).

On October 5, 2015, the trial court granted Acme's motion for summary judgment on its cross-claim against American Eagle.[6] Then, on May 20, 2016, the trial court entered an "[a]greed [o]rder" granting CEVA's motion for summary judgment against American Eagle and "[f]inal [j]udgment."[7] CEVA filed a notice of appeal on June 16, 2016, again challenging the trial court's March 2015 summary judgment dismissing its cross-claim against Acme.

Jurisdiction

In its brief, Acme argues that we lack jurisdiction over this appeal because CEVA untimely filed its notice of appeal.

"[C]ourts always have jurisdiction to determine their own jurisdiction." *Heckman v. Williamson Cty.*, 369 S.W.3d 137, 146 n.14 (Tex. 2012) (internal quotations omitted). Whether we have jurisdiction is a question of law, which we review de novo. *See Tex. A & M Univ. Sys. v. Koseoglu*, 233 S.W.3d 835, 840 (Tex. 2007). Generally, appeals may be taken only from final judgments. *Lehmann v. Har–Con Corp.*, 39 S.W.3d 191, 195 (Tex. 2001). To invoke an appellate court's jurisdiction over an appealable order, a timely notice of appeal must be filed. *See* TEX. R. APP. P. 25.1, 26.1; *Penny v. Shell Oil Prods. Co.*, 363 S.W.3d 694, 697 (Tex. App.—Houston [1st Dist.] 2011, no pet.) ("This Court

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6 This judgment awarded Acme $1,000,000 and $340,000 in attorney's fees against American Eagle.

7 This judgment awarded CEVA $1,900,000 against American Eagle.

lacks jurisdiction over an appeal when the notice of appeal is not timely filed."). With certain exceptions, none of which apply here, a notice of appeal must be filed within thirty days after the judgment is signed. TEX. R. APP. P. 26.1.

A judgment issued without a conventional trial is final for purposes of appeal if it either (1) actually disposes of all claims and parties then before the court, regardless of its language, or (2) states with "unmistakable clarity" that it is a final judgment as to all claims and all parties. *Lehmann*, 39 S.W.3d at 192–93; *see also Farm Bureau Cty. Mut. Ins. Co. v. Rogers*, 455 S.W.3d 161, 163 (Tex. 2015). Because the law does not require a final judgment to be in any particular form, whether a judicial decree is a final judgment is determined by looking at the language of the decree and the record in the case. *Lehmann*, 39 S.W.3d at 195; *Tex-Fin, Inc. v. Ducharne*, 492 S.W.3d 430, 436 (Tex. App.— Houston [14th Dist.] 2016, no pet.).

Notably, a judgment that actually disposes of every issue and party in a case is not interlocutory merely because it states that it is partial or refers to only some of the parties or claims. *Lehmann*, 39 S.W.3d at 200. In other words, "[t]he language of an order or judgment cannot make it interlocutory when, in fact, on the record, it is a final disposition of the case." *Id.* A judgment that finally disposes of all remaining parties and claims, based on the record in the case, is final, regardless

of its language. *Id.*; *see also Jones v. Ill. Emp'rs Ins. of Wausau*, 136 S.W.3d 728, 743 (Tex. App.—Texarkana 2004, no pet.).

Acme argues that CEVA's appeal is untimely because it was not filed within thirty days of an October 5, 2015 order in which the trial court allegedly disposed of all claims and parties. CEVA asserts that the October 2015 order did not dispose of all parties and claims and the thirty-day deadline for its appeal did not begin to run until the trial court granted CEVA summary judgment against American Eagle on May 20, 2016.

The record shows that the October 2015 order disposed of all claims pending in regard to Acme. However, CEVA and American Eagle still had cross-claims pending against one another at that time. And there is no language in the October 2015 order indicating with "unmistakable clarity" that the trial court intended it to be a final judgment as to all claims and parties. *See Lehmann*, 39 S.W.3d at 200 ("The intent to finally dispose of the case must be unequivocally expressed in the words of the order itself."); *Am. Heritage Capital, LP v. Gonzalez*, 436 S.W.3d 865, 869-72 (Tex. App.—Dallas 2014, no pet.) (order did not contain clear indication trial court intended to dispose of entire case, and intent to dispose of whole case not unequivocally expressed in words of order itself where word "final" did not appear and order did not contain statement "that it finally dispose[d] of all claims and all parties" (internal quotations omitted)), *disapproved of on other*

grounds by Hersch v. Tatum, 526 S.W.3d 462, 467 (Tex. 2017); *cf. Tex-Fin*, 492 S.W.3d at 436-37 (order stating "[t]his is the final judgment; it disposes of all claims and parties, and is appealable" contained clear unequivocal finality language (internal quotations omitted)). Accordingly, we hold that the October 2015 order was not a final, appealable order. *See Lehmann*, 39 S.W.3d at 192–93, 200.[8]

The record reveals that the remaining parties and their cross-claims were not disposed of until the trial court signed the agreed order granting CEVA's motion for summary judgment and "F[inal] J[udgment]" against American Eagle, at which time the thirty-day appellate deadline began to run. *See* TEX. R. APP. P. 26.1; *Lehmann*, 39 S.W.3d at 192–93, 200. CEVA filed this appeal on June 16, 2016, which is less than thirty days from the trial court's final order.[9] Accordingly, we further hold that CEVA filed its notice of appeal timely. *See* TEX. R. APP. P. 26.1.

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[8] Acme argues that the cross-claims pending are insufficient to prevent the October 2015 order from becoming final because they were predicated upon a liability finding against CEVA in favor of Verizon that never occurred since CEVA and Verizon's settlement was not predicated upon liability. However, CEVA's pleadings put Acme on notice of its claim for indemnity pursuant to settlement. Acme never filed special exceptions challenging the pleadings. And any argument as to insufficient pleading of the cross-claims was not properly preserved in the trial court. *See Lawrence v. Reyna Realty Grp.*, 434 S.W.3d 667, 674 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("In the absence of a special exception, we construe a petition liberally in favor of the pleader.").

[9] We do not address Acme's assertion that CEVA non-suited its claim against Acme by filing an amended petition after the trial court granted Acme's summary judgment. That pleading is not part of the record. *See Baker v. Skains*, No. 01-11-00501-CV, 2012 WL 2923191, at *6 (Tex. App.—Houston [1st Dist.] July

Summary Judgment

In its sole issue, CEVA argues that the trial court erred in granting Acme's summary-judgment motion because the Agent Carrier Agreement governs the parties' relationship, the Carmack Amendment does not preclude recovery, and Acme's state-law arguments fail as a matter of law.[10]

We review a trial court's decision to grant summary judgment de novo. *Tex. Mun. Power Agency v. Pub. Util. Comm'n of Tex.*, 253 S.W.3d 184, 192 (Tex. 2007). To prevail on a summary-judgment motion, a movant has the burden of establishing 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 plaintiff moves for summary judgment on its claim, it must establish its right to summary judgment by conclusively proving all the elements of its cause of action as a matter of law. *Rhone-Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999); *Anglo-Dutch Petroleum Int'l, Inc. v. Haskell*, 193 S.W.3d 87, 95 (Tex. App.—Houston [1st Dist.] 2006, pet. denied).

12, 2012, no pet.) ("The attachment of documents as exhibits or appendices to briefs is not formal inclusion in the record on appeal and, thus, the documents cannot be considered."). We note, however, that CEVA asserts the amended pleading only concerned its claims against American Eagle and it expressly reserved its appellate rights against Acme therein.

[10] In its prayer for relief, CEVA requests, alternatively, that it "be granted" summary judgment, but it does not present any issues or arguments directly addressing any alleged error in regard to the trial court denying its summary-judgment motion. Thus, to the extent that it attempts to do so in its prayer, such issues are inadequately briefed. *See* TEX. R. APP. P. 38.1.

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.

Carmack Amendment

In its first amended motion for summary judgment, Acme argued that it was entitled to judgment, as a matter of law, because CEVA's theories of recovery based on state law, i.e., negligence, breach of contract, breach of warranty, contribution, and indemnity, are pre-empted by the Carmack Amendment. *See* 49 U.S.C. § 14706 (2018). CEVA asserts that the Carmack Amendment does not preclude its ability to recover on its state law claims.

Here, CEVA can prevail only if Acme's payment of $1 million to Verizon in settlement of Verizon's claims against Acme, did not extinguish CEVA's right to recovery against Acme. In its first amended answer and cross-claims, CEVA asserted that if it was "somehow liable" to Verizon for the damages it alleged in this case, "then such liability derives in whole or in part from the fault, negligence, and/or breaches of express or implied warranties and/or contractual obligations" by Acme and American Eagle. CEVA also asserted that it, under federal law, was entitled to "all rights, limitations, and defenses provided by the Carmack

Amendment." Thus, before we can evaluate whether the trial court could have properly granted Acme's summary-judgment motion, we must first determine what avenues of relief were available to CEVA, i.e., whether the Carmack Amendment applies and to what extent it preempts CEVA's state law claims.

The Carmack Amendment to the Interstate Commerce Act governs claims against a carrier for loss or damage to goods it transports in interstate commerce. *See* 49 U.S.C. §14706; *Lexington Ins. Co. v. Daybreak Express, Inc.*, 393 S.W.3d 242, 243 (Tex. 2013). It provides, in relevant part, that "[a] carrier providing transportation or service . . . shall issue a receipt or bill of lading for property it receives for transportation" and "[t]hat carrier and any other carrier that delivers the property and is providing transportation or service . . . are liable to the person entitled to recover under the receipt or bill of lading." 49 U.S.C. § 14706(a)(1). The United States Court of Appeals for the Fifth Circuit has explained that "Congress intended for the Carmack Amendment to provide *the exclusive cause of action for loss or damages to goods arising from the interstate transportation of those goods by a common carrier*." *Hoskins v. Bekins Van Lines*, 343 F.3d 769, 778 (5th Cir. 2003). Thus, the preemptive scope of the Carmack Amendment with respect to these types of claims is "sweeping." *Trans Enters., LLC v. DHL Express (USA), Inc.*, 627 F.3d 1004, 1008 (5th Cir. 2010).

The Carmack Amendment applies to claims between carriers and those "entitled to recover under the . . . bill of lading."[11] 49 U.S.C. §14706(a)(1). It does not apply to "brokers." *Wise Recycling, LLC v. M2 Logistics*, 943 F. Supp. 2d 700, 702–03 (N.D. Tex. 2013) ("Ample case law suggests that a Carmack Amendment claim may not be brought against a broker."). A "carrier" means "a motor carrier, a water carrier, and a freight forwarder." 49 U.S.C. § 13102(3). A "broker" is defined as "a person, other than a motor carrier or employee or agent of a motor carrier, that as a principal or agent sells, offers to sell, negotiates for, or holds itself out by solicitation, advertisement, or otherwise as selling, providing, or arranging for, transportation by a motor carrier for compensation." 49 U.S.C. § 13102(2).

"The difference between a carrier and a broker is often blurry." *Neb. Turkey Growers Coop. Ass'n v. ATS Logistics Servs., Inc.*, No. 4:05CV3060, 2005 WL 3118008, at *4 (D. Neb. Nov. 22, 2005). "The crucial distinction is whether the party legally binds itself to transport, in which case it is considered a carrier." *Id.*; *see also The Mason & Dixon Lines, Inc. v. Walters Metal Fabrication, Inc.*, Case No. 13-cv-1262-SMY-DGW, 2014 WL 4627715, at *3 (S.D. Ill. Sept. 16, 2014) ("One crucial distinction between a carrier and a broker is the legal responsibilities

[11] "A bill of lading 'records that a carrier has received goods from the party that wishes to ship them, states the terms of carriage, and serves as evidence of the contract of carriage.'" *Kawasaki Kisen Kaisha Ltd. v. Regal-Beloit Corp.*, 561 U.S. 89, 94, 130 S. Ct. 2433, 2439 (2010) (quoting *Norfolk S. Ry. Co. v. Kirby*, 543 U.S. 14, 18–19, 125 S. Ct. 385, 390 (2004)).

taken on by the party.") (citing 49 C.F.R. § 371.2(a)). In other words, if the party "accepted responsibility for ensuring delivery of the goods, regardless of who actually transported them," then the party "qualifies as a carrier," but if the party "merely agreed to locate and hire a third party to transport" the goods, "then it was acting as a broker." *ASARCO LLC v. Engl. Logistics Inc.*, 71 F. Supp. 3d 990, 995 (D. Ariz. 2014) (quoting *CGU Int'l Ins., PLC v. Keystone Lines Corp.*, No. C-02-3751 SC, 2004 WL 1047982, at *2 (N.D. Cal. May 5, 2004)). This determination is not made based on what a party labels itself or if it is licensed as a broker or a carrier, but how it represents itself to the public and its relationship with the shipper. *ASARCO*, 71 F. Supp. 3d at 995; *see also Universal Med. Sys., Inc. v. C.H. Robinson Worldwide, Inc.*, Case No. 1:12 CV 126, 2013 WL 12138550, at *3 (N.D. Ohio Feb. 6, 2013) (party's status as "licensed broker, but not a licensed motor carrier, is not dispositive of its liability under the Carmack Amendment, nor is the ownership of the vehicles used to transport the goods"). Thus, relevant to determining a party's status as a carrier or broker "are the services it offered, as well as whether it held itself out to the public as the actual transporter of goods." *Pelletron Corp. v. C.H. Robinson Worldwide, Inc.*, Civ. Action No. 11-6944, 2012 WL 310485, at *3 (E.D. Penn. July 31, 2012) (rejecting party's assertion it was a "broker" where it held itself out to be a carrier).

Without elaboration or citation to the record, CEVA asserts that "the record is replete with factual issues as to the undertaking and role of Acme." But it cites cases for the proposition that this inquiry is not well-suited for summary judgment. Regardless, it is undisputed that Acme never had physical possession of the stolen cargo at issue.[12] Therefore, our analysis turns on whether Acme ensured delivery of the shipment, as opposed to merely arranging for third-party transportation, and how Acme held itself out to CEVA and the public.

Significantly, it is evident from the record, and undisputed, that Acme remained liable for the shipment after subcontracting it to American Eagle. The parties disagree as to whether the Bill of Lading or Agent Carrier Agreement governs their relationship regarding indemnification and limitation of liability. However, the record shows that both of these documents purport to bind Acme to ensure delivery of the shipment at issue.[13] They both identify Acme as the

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[12] The record shows that Acme subcontracted the particular load at issue to American Eagle after Acme had been hired by CEVA. American Eagle then picked up the goods for transportation directly from CEVA. In the trial court, CEVA asserted that Acme had subcontracted this load without its consent. However, CEVA does not make this assertion in this Court. *See* TEX. R. APP. P. 38.1.

[13] In regard to whether Acme was allowed to subcontract the shipment to American Eagle, CEVA expressly argued the following in its briefing to the trial court:

> Regardless of the red-herring type 'factual issues' asserted by ACME as to what transportation intermediary definition either CEVA or A[cme] might fit into, what is clear, is that whether A[cme] was performing actual physical transportation of the cargo, or merely assuming contractual obligations to do so, its liability remains the

"carrier" and provide that Acme will be liable to CEVA for failing to ensure delivery.[14] The deposition testimony from corporate representatives of both CEVA and Acme provides further support for the conclusion that Acme was not merely a broker. Although Acme's representative, Gaines Johnson, testified that he believed that Acme served as a broker for CEVA regarding the shipment and in their course of dealings, he was unequivocal that Acme had the capacity to, and from time-to-time did, provide carrier services for its customers. He also testified that Acme and CEVA never made a distinction between Acme's services as a broker versus its services as a carrier. CEVA's representative, Sydney Wolf, explained that only Acme, and not American Eagle, was an approved carrier for CEVA.

The summary-judgment evidence conclusively establishes that Acme was a carrier for purposes of the Carmack Amendment, and CEVA did not raise a genuine issue of material fact to the contrary. Acme may have not actually taken physical possession of the shipment, but Acme was expressly liable for it under

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> same. In other words . . . it remains liable for that portion of the cargo move since it contracted to be liable for the same, both under the subject bill of lading and the master agreement.

[14] The Bill of Lading lists "Acme (New Horizon)" as the carrier. Gaines Johnson testified that New Horizon later changed its name to American Eagle and that Acme continued to do business with it under the same terms after the name change. Sydney Wolf explained that the Bill of Lading would have been filled out by CEVA based on information provided by Acme. For purposes of this appeal, Acme does not dispute that it is a party to this Bill of Lading with CEVA.

either the Bill of Lading or the Agent Carrier Agreement (or both). And the testimony from Acme's representative that it was acting as a "broker" does not create a fact issue under these circumstances. *See ASARCO*, 71 F. Supp. 3d at 995 (determination not made based on what party labels itself).

CEVA further asserts that even if Acme falls within the definition of a "carrier," the Carmack Amendment cannot apply if CEVA is a broker. However, whether CEVA is a "broker" with respect to the shipment is irrelevant. Instead, our inquiry is focused on whether CEVA is entitled to recover under the Bill of Lading at issue. *See* 49 U.S.C. § 14706(a)(1) (carrier is "liable to the person entitled to recover under the receipt or bill of lading"); *Pyramid Transp., Inc. v. Greatwide Dall. Mavis, LLC*, Civ. Action No. 3:12-CV-0149-D, 2013 WL 840664, at *4 (N.D. Tex. Mar. 7, 2013).[15]

Finally, CEVA argues that the Carmack Amendment does not apply because it "opted out of Carmack application and defined its role as a non-carrier relative to its customer Verizon." However, it is CEVA's relationship with Acme, not Verizon, in regard to the Carmack Amendment that is at issue in this appeal.

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[15] Standing to sue under the Carmack Amendment is limited to "[o]nly those 'entitled to recover under the receipt or bill of lading.'" *Pyramid Transp., Inc. v. Greatwide Dall. Mavis, LLC*, Civ. Action No. 3:12-CV-0149-D, 2013 WL 840664, at *4 (N.D. Tex. Mar. 7, 2013) (quoting 49 U.S.C. § 14706(a)(1)). While standing is not limited to a shipper, the court explained that "bills of lading are typically between shippers and carriers." *Id.* And it is undisputed that CEVA is the party "entitled to recover under the . . . bill of lading" at issue here. 49 U.S.C. § 14706(a)(1).

CEVA points to nothing in either the Bill of Lading, Agent Carrier Agreement, or elsewhere, that expressly waives the parties' rights and remedies under the Carmack Amendment. *See* 49 U.S.C. § 14101(b)(1) (requiring express agreement between shipper and carrier in writing); *Travelers Indem. Co. of Ill. v. Schneider Specialized Carriers, Inc.*, No. 04 Civ. 5307(RJH), 2005 WL 351106, at *5 (S.D.N.Y. Feb. 10, 2005) ("Absent an express agreement waiving the protections of the Carmack Amendment, the Court finds that" the parties have "not opted out of the Carmack Amendment's scope."). Also, there is no evidence in the record that Acme contracted with, or had any direct liability to, Verizon.

Accordingly, we hold that the Carmack Amendment applies and, thus, constitutes CEVA's exclusive remedy against Acme for goods lost or damaged during shipment in this case. *See Hoskins*, 343 F.3d at 778 (holding Carmack Amendment exclusive remedy and "complete pre-emption doctrine applies").[16]

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[16] Further, CEVA's recovery, if any, against Acme would fall under the general liability provisions of the Carmack Amendment. To the extent that CEVA asserts that it is entitled to indemnity, the Carmack Amendment provides for indemnity as follows:

> The carrier issuing the receipt or bill of lading under . . . this section or delivering the property for which the receipt or bill of lading was issued is entitled to recover from the carrier over whose line or route the loss or injury occurred the amount required to be paid to the owners of the property, as evidenced by a receipt, judgment, or transcript, and the amount of its expenses reasonably incurred in defending a civil action brought by that person.

49 U.S.C. § 14706(b). CEVA concedes that the agreement between it and Verizon was not subject to the Carmack Amendment. Thus, it is neither the "carrier

Having held that the Carmack Amendment applies and constitutes CEVA's exclusive remedy in this case, we must now evaluate whether Acme satisfied its obligations, if any, to CEVA when it settled with Verizon for $1 million.

Acme's Payment to Verizon

As part of its sole issue, CEVA asserts that there is a genuine issue of material fact as to whether Acme's settlement with, and payment directly to, Verizon absolved Acme from any liability to CEVA in this case. Thus, we must evaluate whether (1) Acme's direct payment to Verizon, as opposed to CEVA, was proper, and (2) whether Acme's liability was limited to the $1 million that it paid.

Payment to Verizon

In a portion of its sole issue, CEVA argues that Acme paid Verizon at its own peril because Acme did not have direct liability to Verizon and the Bill of Lading and Agent Carrier Agreement both establish Acme's liability to CEVA

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issuing the receipt or bill of lading" or a party "delivering the property for which the receipt or bill of lading was issued." This does not preclude CEVA's ability to recover, if it is so entitled, against Acme under the general liability provisions of the Carmack Amendment. And to the extent that CEVA argues that Acme did not plead for recovery pursuant to the Carmack Amendment, we note that Acme had fair notice of CEVA's reliance on the Carmack Amendment for recovery. CEVA specifically asserted in its trial-court pleadings that it "claim[ed] the benefit of all rights, limitations, and defenses provided by the Carmack Amendment." In its pleadings, it also indisputably sought to recover from Acme if it was found liable to Verizon. And Acme did not file special exceptions challenging the sufficiency of CEVA's pleading. *See Lawrence*, 434 S.W.3d at 675 (Tex. App.—Houston [1st Dist.] 2014, no pet.) ("In the absence of a special exception, we construe a petition liberally in favor of the pleader.").

alone. Acme argues that its $1 million payment to Verizon extinguished its liability in this case because CEVA received a settlement "credit" and it cannot now seek recovery from Acme since it is a settling defendant. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 33.016 (Vernon 2015).

The Carmack Amendment provides that carriers are "liable to the person entitled to recover under the receipt or bill of lading." 49 U.S.C. § 14706(a)(1). The Bill of Lading applicable here provides for the following liability:

> Carrier's liability to shipper for loss, damage or delay shall be equal to shipper's liability to its customer for such loss, damage or delay, PROVIDED, HOWEVER, in no event, shall carrier's liability exceed One Million Dollars ($1,000,000) per shipment, unless a higher degree of liability is specifically assumed in writing by an authorized representative of carrier.

"Acme/New Horizon" is listed as the "Carrier," and "CEVA DFW" is listed as the "Shipper."[17] Thus, CEVA is the "person entitled to recover under the . . . bill of lading," and Acme's liability, under the Carmack Amendment, was to CEVA, not Verizon.

Further, the Carmack Amendment makes Acme strictly liable to CEVA for CEVA's damages as a result of the lost or stolen cargo.[18] As explained by the United States Court of Appeals for the Third Circuit:

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17 Neither party disputes that it is a proper party to the Bill of Lading.

18 In turn, Acme would be able to recover from American Eagle pursuant to the indemnity provisions of the Carmack Amendment. *See* 49 U.S.C. § 14706(b).

> The Carmack Amendment struck a compromise between shippers and carriers. In exchange for making carriers ***strictly liable*** for damage to or loss of goods, carriers obtained a uniform, nationwide scheme of liability, with damages limited to actual loss—or less if the shipper and carrier could agree to a lower declared value of the shipment. . . . . Making carriers ***strictly liable*** relieved a shipper of the burden of having to determine which carrier damaged or lost its goods (if the shipper's goods were carried by multiple carriers along a route). It also eliminated the shipper's potentially difficult task of proving negligence.

Certain Underwriters at Interest at Lloyds of London v. United Parcel Serv. of Am., Inc., 762 F.3d 332, 335 (3d Cir. 2014) (emphasis added). There is nothing in the record that would demonstrate that Acme had any sort of direct liability to Verizon, as opposed to CEVA, by contract or otherwise.

Acme further argues that because CEVA was entitled to a settlement "credit" in regard to Acme's payment to Verizon, CEVA cannot seek further relief from Acme. Given Acme's strict liability to CEVA for its damages resulting from the lost or stolen shipment under the Carmack Amendment, Acme's liability would be completely extinguished only if Acme's settlement with Verizon also resolved Verizon's liability claim against CEVA. It did not. To the extent that Acme challenges the reasonableness of CEVA's settlement with Verizon for $1.9 million, this challenge should be addressed on remand along with the amount of Acme's liability to CEVA, if any.[19]

[19] We note that the record reflects that CEVA obtained a judgment on its cross-claim against American Eagle for $1.9 million, the same amount CEVA paid to Verizon.

Accordingly, we hold that, pursuant to the Bill of Lading, Acme remains strictly liable to CEVA. We sustain this portion of CEVA's sole issue.

Limitation of Liability

In a portion of its sole issue, CEVA argues that Acme's liability is not limited to $1 million because the purported limitation of Acme's liability to $1 million in the Bill of Lading is subject to terms in the Agent Carrier Agreement, which provide for greater liability. Acme argues that because the Bill of Lading exclusively governs the parties' relationship under the Carmack Amendment, the $1 million limitation of liability in the agreement applies in this case.

Under the Carmack Amendment, a carrier may limit its liability "to a value established by written or electronic declaration of the shipper or by written agreement between the carrier and shipper if that value would be reasonable under the circumstances surrounding the transportation." 49 U.S.C. § 14706(c)(1)(A). CEVA does not dispute the $1 million limitation of liability in the Bill of Lading, but instead asserts that the Agent Carrier Agreement, not the Bill of Lading, applies in this case.

Courts look to agreements beyond the bill of lading, when applicable, to determine if the parties have agreed to limit a carrier's liability. *See Siemens Water Tech. Corp. v. Trans-United, Inc.*, Civ. Action No. 4:11-cv-3272, 2013 WL 4647658, at *4 (S.D. Tex. Aug. 29, 2013) (denying summary judgment because

fact issue existed as to, among other things, whether bill of lading was entered into subject to broker-carrier agreement); *see also Great Am. Ins. Co. of N.Y., Inc. v. USF Holland, Inc.*, No. 11 Civ. 6879(KBF), 2013 WL 1832185, at *2 (S.D.N.Y. May 1, 2013) (That Carmack Amendment preempts state law breach of contract claims "says nothing of the interpretive tools the Court may use to evaluate the Carmack claim."). As explained by the United States Court of Appeals for the Fifth Circuit:

> [The Carmack Amendment's] attempt to supercede overlapping and sometimes differing state remedies for breach is nowhere shown to have been intended to modify the common-law duties of a common carrier under its contract of carriage, nor to eliminate recovery for their breach simply because the carrier issued a bill of lading. To the contrary, as the decisions show, the statutory emphasis upon a carrier's liability under the bill of lading issued by it was, in the interests of shippers and consignees, to centralize in one carrier—the one that issued the bill of lading—liability for breaches in the contract of carriage, so that shippers and consignees could look to this one source (instead of seeking out fault from among connecting carriers) for damages caused by any default in the performance of the contract of carriage.

Air Prods. & Chems., Inc. v. Ill. Cent. Gulf. R.R. Co., 721 F.2d 483, 487 (5th Cir. 1983).

We need not determine at this juncture whether Acme's liability is limited to $1 million as set forth in the Bill of Lading or a greater amount as contemplated by

the Agent Carrier Agreement.[20] In either case, a genuine issue of material fact remains.

There is an issue of genuine material fact as to whether the Agent Carrier Agreement expired. Acme argues that the agreement is unenforceable because it expired by its own terms in 2004. CEVA argues that the agreement is valid and enforceable because its terms provide for automatic renewal, unless terminated by the parties, and neither party has terminated the agreement.

The Agent Carrier Agreement specifically provides the following:

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[20] CEVA further asserts that Acme is barred from disputing the applicability of the Agent Carrier Agreement based on the doctrines of judicial estoppel and judicial admissions. In support of this assertion, CEVA cites to three items in the record. The first is a letter between Acme's co-counsel discussing CEVA's claim against it and the potential applicability of two different agreements. This communication does not concern judicial estoppel because it was not made in a prior judicial proceeding. *See Wight Realty Interests, Ltd. v City of Friendswood*, 433 S.W.3d 26, 34 (Tex. App.—Houston [1st Dist.] 2013, pet. denied) (one requirement is that statement at issue be "made in a prior judicial proceeding"). Similarly, the communication does not constitute a judicial admission because it was not made as part of this same proceeding, nor was it unequivocal. *See Horizon/CMS Healthcare Corp. v. Auld*, 34 S.W.3d 887, 905 (Tex. 2000) ("must be a clear, deliberate, and unequivocal statement"). The other two "admissions" relied upon by CEVA are from separate actions that Acme pursued against its insurance carrier for indemnification and a former lawyer for malpractice. These also do not constitute judicial admissions because they do not involve the same parties or proceeding as in this appeal. *See Holloway v. Holloway*, 671 S.W.2d 51, 59 (Tex. App.—Dallas 1983, writ dism'd) ("To be conclusive against him, the admission must be made in the same proceeding or perhaps in another proceeding involving the same parties."). Similarly, judicial estoppel is inapplicable because, among other reasons, there is no evidence that these proceedings ended favorably for Acme. *See Wight*, 433 S.W.3d at 34 (requiring "successful maintenance of the contrary position in the prior action").

> The Term of this Agreement shall be for a period of one (1) year; provided, that any party may terminate this Agreement at any time by giving a thirty-(30) day written notice. This Agreement shall automatically renew for ***an additional one-year terms and conditions*** if notice of termination has not been given by either party.

(Emphasis added.) The parties dispute the meaning of the phrase "automatically renew for an additional one-year terms and conditions." CEVA asserts that the court should disregard the "an" and interpret the clause to continue until it is terminated by one of the parties giving notice of such. Acme asserts that the only reasonable interpretation is that the use of "an" means the parties only intended to extend the original term by one year.

The parties' intent is not clear from a plain reading of the language of the agreement. Accordingly, we hold that this provision of the Agent Carrier Agreement is subject to two reasonable interpretations and is, therefore, ambiguous. *See J.M. Davidson, Inc. v. Webster*, 128 S.W.3d 223, 229 (Tex. 2003) ("Deciding whether a contract is ambiguous is a question of law for the court."). Thus, there is a genuine issue of material fact as to the parties' intent in regard to the duration of the Agent Carrier Agreement, making summary judgment improper. *See Cmty. Health Sys. Prof'l Servs. Corp. v. Hansen*, 525 S.W.3d 671, 681 (Tex. 2017) ("[I]f the contract is subject to two or more reasonable interpretations after applying the pertinent rules of construction, the contract is

ambiguous, creating a fact issue on the parties' intent." (internal quotations omitted)).[21]

We sustain this portion of CEVA's sole issue.

Because fact issues exist concerning the applicability of the Agent Carrier Agreement and the interpretation of the agreement in connection with the Bill of Lading, we further hold that the trial court erred in granting Acme's summary-judgment motion.

Conclusion

We reverse the judgment of the trial court and remand for further proceedings consistent with this opinion.

Terry Jennings
Justice

Panel consists of Justices Jennings, Bland, and Brown.

[21] Acme's assertions that there is no evidence that the Agent Carrier Agreement was renewed and the representatives of both CEVA and Acme were not aware of the agreement's existence are matters for the fact finder to consider on remand.