Opinion issued November 29, 2018

In The

Court of Appeals

For The

First District of Texas

NO. 01-17-00386-CV

KENYON INTERNATIONAL EMERGENCY SERVICES, INC., Appellant

V.

STARR INDEMNITY & LIABILITY COMPANY, Appellee

On Appeal from the 80th Judicial District Court
Harris County, Texas
Trial Court Case No. 2016-85229

MEMORANDUM OPINION ON REHEARING[1]

This case concerns an insurer's, Starr Indemnity & Liability Company's, potential liability under Starr's insurance policy with third party Seaport Airlines.

[1] Appellee, Starr Indemnity & Liability Company, filed a motion for panel rehearing of our July 17, 2018 opinion. We deny the motion. We withdraw our opinion of July 17, 2018 and issue this one in its place. The disposition remains the same.

Seaport outsourced (via contract) to Kenyon International Emergency Services, Inc. ("Kenyon") "emergency and consulting services in the event of a disaster." After a Seaport flight crashed, Kenyon provided the contracted-for services on Seaport's behalf. Seaport, which is now bankrupt, did not pay Kenyon for those services. After receiving permission from the bankruptcy court, Kenyon sued Seaport for breach of contract and obtained a default judgment obligating Seaport to pay Kenyon for the services Kenyon provided. Kenyon then sued Seaport's insurer, Starr, seeking a declaratory judgment that Starr's insurance policy with Seaport covered the costs expended by Kenyon on Seaport's behalf. Kenyon also brought claims against Starr for breach of contract and equitable subrogation.

The parties filed cross-motions for summary judgment, and the trial court entered a judgment in favor of Starr. Because we conclude that a fact issue exists about whether Starr's insurance policy covers some of the sums expended, we reverse and remand on the declaratory judgment claim. We also reverse as to equitable subrogation. We affirm, however, on the breach of contract claim because Kenyon has not established its standing to sue Starr.

Background

In November 2014, Starr issued Seaport a one-year aviation insurance policy. In July 2015, a Seaport aircraft crashed in Alaska, killing the pilot and injuring four passengers.

At the time of the crash, Seaport had an agreement with Kenyon, an emergency services company, to provide emergency and consulting services in the event of a disaster. In other words, Seaport contracted out its emergency relief services. At Seaport's request, Kenyon provided, on Seaport's behalf, services related to the plane crash, including a welfare support line, mental health support for staff and families, and other disaster response services. Seaport later asked Kenyon to cease its services, and Kenyon complied.

On the day of the crash, the National Transportation Safety Board (NTSB) treated the crash as within the scope of the Aviation Disaster Family Assistance Act of 1996, which imposed certain obligations on Seaport. *See* Aviation Disaster Family Assistance Act of 1996 ("ADFAA"). Soon thereafter, the NTSB determined that the crash did not fall under the Act.

Seaport failed to pay Kenyon for the services it provided, and Kenyon sued Seaport in Harris County district court.[2] Seaport failed to answer, and Kenyon obtained a default judgment awarding it $214,930.07 in damages for breach of the emergency services contract and $5,000 in attorney's fees. Starr did not appear in that case.

[2] After Kenyon filed suit, Seaport entered bankruptcy. The bankruptcy court lifted the bankruptcy stay to permit Kenyon to pursue its suit.

In this lawsuit, Kenyon seeks payment from Starr on the theory that the costs it incurred on Seaport's behalf were covered under Seaport's aviation insurance policy. Kenyon alleges three causes of action against Starr: declaratory judgment about coverage, breach of contract, and equitable subrogation. The parties filed cross-motions for summary judgment, and the trial court denied Kenyon's motion and granted Starr's motion, entering judgment that Kenyon take nothing on its claims. Kenyon appealed.

Discussion

On appeal, Kenyon raises two issues. First, Kenyon argues that the trial court erred by granting summary judgment in Starr's favor and denying summary judgment in Kenyon's favor because the summary judgment evidence demonstrates that Kenyon was entitled to payment under Starr's insurance policy. Second, Kenyon argues that the trial court erred by failing to award attorney's fees under section 38.001 of the Texas Civil Practice and Remedies Code.

A. Standard of Review

We review a trial court's summary judgment de novo. *Travelers Ins. Co. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). When reviewing a summary judgment, we take as true all evidence favorable to the nonmovant, and we indulge every reasonable inference and resolve any doubts in the nonmovant's favor. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005).

In a traditional summary judgment motion, the movant has the burden to show that no genuine issue of material fact exists and that the trial court should grant judgment as a matter of law. TEX. R. CIV. P. 166a(c); *KPMG Peat Marwick v. Harrison Cty. Hous. Fin. Corp.*, 988 S.W.2d 746, 748 (Tex. 1999). A party moving for summary judgment on one of its own claims must conclusively prove all essential elements of the claim. *See Rhône–Poulenc, Inc. v. Steel*, 997 S.W.2d 217, 223 (Tex. 1999). A defendant may also prevail by traditional summary judgment if it conclusively negates at least one essential element of a plaintiff's claim or conclusively proves an affirmative defense. *See IHS Cedars Treatment Ctr. of DeSoto, Tex., Inc. v. Mason*, 143 S.W.3d 794, 798 (Tex. 2004); *Rhône–Poulenc*, 997 S.W.2d at 223.

B. Applicable Law

We construe an insurance policy using the same rules that govern the construction of any other contract. *See Ulico Cas. Co. v. Allied Pilots Ass'n*, 262 S.W.3d 773, 778 (Tex. 2008). We interpret contracts in light of their plain language. *See Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 126 (Tex. 2010). When the contract does not define a term, we afford the term its plain, ordinary, and generally accepted meaning (at the time of its use). *See Valence Operating*, 164 S.W.3d at 662. We examine the entire contract to harmonize and effectuate all provisions. *See Seagull Energy E & P, Inc. v. Eland Energy, Inc.*, 207

S.W.3d 342, 345 (Tex. 2006). And we do not rewrite contracts under the guise of interpretation. *See Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003).

C. The Insurance Policy

The insurance policy provides insurance coverage for bodily injury and property damage liability as follows:

> **LIABILITY COVERAGES**
>
> Coverage A - **Bodily Injury Liability Excluding Passengers (including any and all related claims)** - To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury sustained by any person excluding any passenger;
>
> Coverage B - **Property Damage Liability** - To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of property damage;
>
> Coverage C - **Passenger Bodily Injury Liability (including any and all related claims)** - To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury sustained by any passenger;[3]

The policy defines bodily injury, property damage, and related claims as follows:

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[3] Coverage D provides: **Single Limit Bodily Injury and Property Damage Liability (including any and all related claims)** - To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury sustained by any person (excluding any passenger unless the words "including passengers" appear in Item 3 of the Declarations) and property damage; caused by an occurrence and arising out of the ownership, maintenance or use of the aircraft; or, only with respect to Coverages A, B, and D, caused by an occurrence and arising out of the maintenance or use of the premises in or upon which the aircraft is stored.

> **Bodily injury** means bodily injury, sickness, disease or mental anguish sustained by any person which occurs during the policy period, including death at any time resulting therefrom.
>
> . . .
>
> **Property damage** means (a) physical injury to or destruction of tangible property which occurs during the policy period, including loss of use thereof at any time resulting therefrom, or (b) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period.
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> . . .
>
> **Related claims** means all claims for care and loss of service, loss of society and consortium, mental anguish, emotional distress, loss of support, medical and funeral expenses, and any and all other damages from or arising out of bodily injury to any person or passenger. Notwithstanding anything to the contrary in the definition of bodily injury, the Company's liability and coverage for damages for both bodily injury and related claims are included and combined within the "each person" and "each occurrence" Limits of Liability specified in the Declarations, as applicable, and there are no separate or additional Limits of Liability for related claims.

The policy contains the following exclusion and exceptions to the exclusion:

> (a) [The policy does not apply to] any liability for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. This exclusion does not apply to liability for damages:
>
> > (1) that the insured would have in the absence of a contract or agreement; or
> >
> > (2) assumed in an insured contract, provided the bodily injury or property damage occurs subsequent to the execution and prior to the termination of the insured contract.

D. Analysis

We first address the declaratory judgment claim. We then turn to breach of contract and equitable estoppel.

1. Declaratory judgment

Kenyon seeks a declaratory judgment that the insurance policy covers the sums it expended on Seaport's behalf. Kenyon argues that the costs it incurred on behalf of Seaport are covered because they are sums that Seaport was "legally obligated to pay . . . because" of "bodily injury" or a related claim.

Putting aside for these purposes any question of standing and viewing all facts in the light most favorable to Kenyon, Kenyon has shown that at least some of the expenditures at stake could qualify for coverage, precluding summary judgment in favor of Starr. In other words, some of the expenditures at issue may be sums that Seaport became legally obligated to pay because of bodily injury or a related claim. And the fact that Seaport contracted with Kenyon to perform the relevant services, rather than perform them itself, does not change this result or alleviate any independent duty Seaport may have had.

The Starr-Seaport policy covers "all sums [that] the insured [Seaport] shall become legally obligated to pay as damages because of bodily injury sustained by any person excluding any passenger." It likewise covers "all sums [that] the insured [Seaport] shall become legally obligated to pay as damages because of bodily injury

sustained by any passenger." The policy defines bodily injury to mean "bodily injury, sickness, disease or mental anguish sustained by any person which occurs during the policy period, including death at any time resulting therefrom." Moreover, with regard to bodily injury coverage (both for passengers and nonpassengers), the policy includes "any and all related claims." Related claims means all "claims for care and loss of service, loss of society and consortium, mental anguish, emotional distress, loss of support, medical and funeral expenses, and any and all other damages from or arising out of bodily injury to any person or passenger."

In its brief, Kenyon does not specify the nature of the emergency services costs that it incurred on behalf of Seaport as a result of Seaport's plane crash. The record reflects that the costs Kenyon incurred included activating:

- a call center;
- a "DRS service (team of 4 people first responders),"
- a "DHS Service plus (1 mental health for staff & families)"; and
- a 24/7 welfare support line.

Kenyon's statement of charges to Seaport included the rates for the personnel it activated, the cost of travel for Kenyon personnel and family members of the passengers, ground transportation, meals and lodging for personnel and family members, and various other costs.

Viewed in the light most favorable to Kenyon, at least some of the sums expended (on behalf of Seaport) may be covered as sums Seaport became legally obligated to pay under ADFAA because of bodily injury that occurred in the plane crash or any and all related claims. In other words, Kenyon has raised a fact issue as to whether the reason at least some of the post-crash emergency services were performed—and potentially had to be performed (apart from any obligation created by the Kenyon-Seaport contract)—was bodily injury sustained in the plane crash, or any and all claims related to bodily injury. Losses Kenyon sustained could thus fall under the covered terms of the policy.

We likewise conclude, for summary judgment purposes, that no exclusion categorically bars coverage. The policy excludes from coverage damages that an insured is obligated to pay by reason of the assumption of liability through contract. An exception bars the exclusion's application when the damages were ones that "the insured would have in the absence of a contract or agreement." Consistent with its text, courts have interpreted this type of "assumption of liability" exclusion as applying when "the insured has assumed a liability for damages that exceeds the liability it would have under general law." *Ewing Constr. Co. v. Amerisure Ins. Co.*, 420 S.W.3d 30, 37 (Tex. 2014). Viewing the facts in the light most favorable to Kenyon, we cannot conclude that the only legal obligation at stake here was one Seaport assumed solely by contract. *See id.*

Kenyon performed disaster relief services for Seaport. Seaport was at least initially legally obligated under ADFAA to perform some disaster relief.[4] Indulging every inference in Kenyon's favor, as we must, we conclude that Seaport may have been legally obligated under ADFAA to pay for at least some of the services Kenyon performed on its behalf as a result of the bodily injury that occurred, or a related claim. Put differently, viewed in the light most favorable to Kenyon, we conclude that, even if Seaport had not contracted with Kenyon, Seaport might have had to incur at least some of the emergency services costs at issue. Those costs would not fall under the policy exclusion.

This record does not provide enough information for us to know, however, whether each component of Kenyon's costs was covered. Kenyon contends that the default judgment reflects sums it expended on Seaport's behalf that Seaport *was legally obligated to pay* because of bodily injuries (including any and all related claims). But the record does not show whether any particular piece of that judgment is factually something that Seaport would have been legally obligated to pay because of bodily injuries. Although federal law (ADFAA) initially required Seaport to undertake certain tasks because of the plane crash and the bodily injury it caused, *see* 49 USC §§ 41112–13, et seq., the federal government later declassified the crash,

[4] Kenyon points us to no authority for any legal obligation under tort law (rather than under ADFAA) that corresponds to the sums it expended. Our holding is thus limited to obligations created by ADFAA.

removing those obligations. This record presents no breakdown of what costs were incurred before and after that declassification or what costs were incurred as a result of ADFAA. Kenyon has not matched each component of cost with a legal obligation created by the federal government.

Accordingly, we conclude that Kenyon adduced sufficient evidence to show that some of its expenditures may be covered under the terms of the policy, raising a fact issue precluding summary judgment for Starr on Kenyon's claims (absent some other basis for judgment in Starr's favor). But the same fact issue precludes summary judgment in favor of Kenyon. We reverse the trial court's judgment on the declaratory judgment.

2. Standing to assert a breach of contract

Kenyon lacked standing, however, to bring its breach of contract claim. To establish its standing to assert a breach of contract cause of action, Kenyon must prove its privity to the agreement or that it is a third-party beneficiary. *See First Bank v. Brumitt*, 519 S.W.3d 95, 102–03 (Tex. 2017); *OAIC Commercial Assets, L.L.C. v. Stonegate Vill., L.P.*, 234 S.W.3d 726, 738 (Tex. App.—Dallas 2007, pet. denied). Kenyon offers no argument that it is a party to the contract. Instead, Kenyon argues it is a third-party beneficiary.

Well-established principles govern our analysis on this point. "As a general rule, the benefits and burdens of a contract belong solely to the contracting parties,

and 'no person can sue upon a contract except he be a party to or in privity with it.'" *Brumitt*, 519 S.W.3d at 102 (citation omitted). An exception to the rule allows a person who is not a party to the contract to sue under it if the person qualifies as a third-party beneficiary. *Id.*; *see also MCI Telecomms. Corp. v. Tex. Utils. Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999). As the Texas Supreme Court recently instructed us, absent a statutory or other legal rule to the contrary, a person seeking to establish third-party-beneficiary status must demonstrate, based on the contract's terms, "that the contracting parties 'intended to secure a benefit to that third party' and 'entered into the contract directly for the third party's benefit.'" *Brumitt*, 519 S.W.3d at 102 (citation omitted). One cannot establish third-party beneficiary status by showing solely that he would benefit—directly or indirectly—from the contract, or that the parties knew that he would benefit. *Id.* Nor does it matter whether the third party intended or expected to benefit from the contract. *Id.*

In assessing whether one is a third-party beneficiary of a contract, "courts must look solely to the contract's language." *Id.* at 106. We presume that the parties contracted solely for themselves, "and only a clear expression of the intent to create a third-party beneficiary can overcome that presumption." *Id.* at 103. "[D]oubts must be resolved against conferring third-party beneficiary status." *Id*. (citation omitted). And "a mere description of the contract's intended use cannot—on its own—confer

third-party-beneficiary status." *Jody James Farms, JV v. Altman Grp., Inc.*, 547 S.W.3d 624, 635 (Tex. 2018).

Kenyon emphasizes the policy's requirement that Starr will "pay on behalf of the insured all sums [that] the insured shall become legally obligated to pay as damages because of bodily injury sustained by any passenger." It contends that the use of the term "sums" in the insurance policy means that the implied payee of the policy is anyone to whom such sums are owed.

But the policy contains no indication (much less an unequivocal one) that Seaport and Starr entered in the policy for *Kenyon's* benefit. *See Brumitt*, 519 S.W.3d at 103; *Jody James Farms*, 547 S.W.3d at 636 ("The Federal Crop Insurance Act intends general beneficence for insurance agents, but nothing more . . . . The same is true here. The contract between Jody James and Rain & Hail does not express an intent to make the insurance agency a direct beneficiary. Any benefit to the Agency is, at best, indirect and incidental."). *Compare City of Hous. v. Williams*, 353 S.W.3d 128, 145–46 (Tex. 2011) (firefighters were third-party beneficiaries of agreement between city and union; contract expressly stated that one of its purposes was to benefit the specific third parties and "directly guarantee[d]" that the third parties would receive those benefits), *with Tawes v. Barnes*, 340 S.W.3d 419, 428 (Tex. 2011) (lessor was not a third-party beneficiary to contract between lessee and investor when contract failed to identify any "specific, limited group of individuals"

to which the consenting parties owed an obligation), *and S. Tex. Water Auth. v. Lomas*, 223 S.W.3d 304, 306–07 (Tex. 2007) (per curiam) (city's water customers were not third-party beneficiaries of contract between city and water supplier where contract merely provided that one party intended to sell the product to the third parties; contract did not identify any of the specific citizens asserting third-party beneficiary status and "general beneficence does not create third-party rights"). Kenyon bears the burden to show that it is a third-party beneficiary to the policy, and Kenyon has not made the requisite showing. *See Marine Creek Partners, Ltd. v. Caldwell*, 926 S.W.2d 793, 795 (Tex. App.—Fort Worth 1996, no writ); *see also Hudson v. Chartoni Inc.*, No. 01-14-00917-CV, 2016 WL 828053, at *3 (Tex. App.—Houston [1st Dist.] Mar. 3, 2016, no pet.) (mem. op.) (plaintiff bears burden to prove third-party beneficiary status).

Because Kenyon lacks standing to assert a breach of the Starr-Seaport contract, the trial court did not err by granting summary judgment on this claim. *See, e.g.*, *Jody James Farms*, 547 S.W.3d at 635–36; *Steer Wealth Mgmt., LLC v. Denson*, 537 S.W.3d 558, 566–67 (Tex. App.—Houston [1st Dist.] 2017, no pet.); *see also Brumitt*, 519 S.W.3d at 105; *MCI Telecomms.*, 995 S.W.2d at 651–52 (party was not third-party beneficiary where there was "simply no contractual language to indicate that [the contracting parties] entered into the contract directly for [third party's] benefit").

3. Equitable subrogation

Kenyon has nevertheless established a fact issue regarding its entitlement to equitable subrogation. This precludes summary judgment in Starr's favor.

The doctrine of equitable subrogation allows a party who otherwise lacks standing to step into the shoes of and pursue the claims belonging to a party with standing. *Frymire Eng'g Co. v. Jomar Int'l, Ltd.*, 259 S.W.3d 140, 142 (Tex. 2008). Texas courts interpret this doctrine liberally. *Id.* Although the doctrine most often arises in the insurance context, equitable subrogation applies "in every instance in which one person, not acting voluntarily, has paid a debt for which another was primarily liable and which in equity should have been paid by the latter." *Id.* (quoting *Mid–Continent Ins. Co. v. Liberty Mut. Ins. Co.*, 236 S.W.3d 765, 774 (Tex. 2007)). "Thus, a party seeking equitable subrogation must show it involuntarily paid a debt primarily owed by another in a situation that favors equitable relief." *Id.* The burden is on the party asserting equitable subrogation to establish it is entitled to it. *Murray v. Cadle Co.*, 257 S.W.3d 291, 300 (Tex. App.—Dallas 2008, pet. denied).

Here, the question is whether Kenyon, not acting voluntarily, paid a debt for which another was primarily liable and which in equity should have been paid by the latter. As an initial matter, we conclude that Kenyon's payments pursuant to the emergency services contract were involuntary. A payment is voluntary when the payor acts "without any assignment or agreement for subrogation, without being

under any legal obligation to make payment, and without being compelled to do so for the preservation of any rights or property." *Frymire*, 259 S.W.3d at 145. "[Kenyon's] decision to contract with [Seaport] was voluntary; its duty to honor that contract was not." *See id.* at 146. The record shows that Kenyon, acting involuntarily (due to its contractual obligations with Seaport), incurred some costs on behalf of Seaport. *Id.*

Viewed in the light most favorable to Kenyon, the record also shows that equity favors relief. In *Frymire*, the Texas Supreme Court concluded that equity favored allowing a hotel's subcontractor (who installed a defective valve) and its insurer to seek to recoup payments from alleged third-party tortfeasors (the manufacturers of the defective valve), despite the hotel owner's inaction. *Id.* In other words, the installer of the valve could bring claims against the manufacturer of the defective valve to recoup its payment to the hotel for damage caused by the valve. *Id.* ("[W]e have no trouble concluding that [third-party] would be unjustly enriched were Frymire not permitted to pursue its claims"; third party will be unjustly enriched if it escapes liability for its defective product because of subcontractor's contractual payment for damage caused). Likewise, equity permitted an excess insurer to pursue tort claims against a primary insurer and law firm through equitable subrogation, even though the insured itself chose not to pursue those claims. *Keck, Mahin & Cate v. Nat'l Union Fire Ins. Co. of Pittsburgh, PA*, 20 S.W.3d 692, 695–

700 (Tex. 2000). That reasoning applies here. Starr contracted with Seaport to pay for sums Seaport became legally obligated to pay because of bodily injury. To the extent that Kenyon incurred, on behalf of Seaport, costs Seaport became legally obligated to pay because of bodily injury (i.e. costs that would otherwise be covered under the Seaport-Starr policy), then Starr would be unjustly enriched were Kenyon not able to pursue its claim.

For the same reasons, Kenyon satisfied its burden, for summary judgment purposes, as to whether it incurred a "debt" for which Starr was primarily liable. Starr argues that no "debt" existed because Seaport was not legally obligated to provide any of the services provided by Kenyon. But at a minimum, viewing the facts in the light most favorable to Kenyon, Kenyon established that it incurred costs providing disaster relief, on Seaport's behalf, in response to Seaport's plane crash (and the resulting bodily injury). Starr agreed, via contract, to pay sums that Seaport became legally obligated to pay because of bodily injury sustained—as well as any and all related claims. If Seaport were legally obligated to pay, because of bodily injury, sums Kenyon incurred, then Starr would have been primarily liable for those costs under its policy. Kenyon raised a fact issue as to whether at least some of the money that Kenyon expended (pursuant to the Kenyon-Seaport contract) extinguished a debt for which Starr was primarily liable. *See Frymire*, 259 S.W.3d at 143–44 (plaintiff satisfied summary judgment burden to raise fact issue as to

whether defendant's design defect primarily caused damage that plaintiff had paid for and therefore whether defendant was primarily responsible for debt); *see also Keck*, 20 S.W.3d at 695–700. Accordingly, summary judgment on Kenyon's equitable subrogation claim was improper.

* * *

We sustain Kenyon's first issue with respect to its declaratory judgment and equitable subrogation claims. We overrule Kenyon's first issue with respect to its breach of contract claim.

4. Attorney's fees

The trial court did not err in denying Kenyon's request for attorney's fees. As part of its summary judgment motion, Kenyon sought an award for $15,000 in attorney's fees under section 38.001 of the Civil Practice and Remedies Code. Kenyon sought these fees in connection with its breach of contract cause of action. To recover fees under section 38.001, a party must: (1) prevail on a cause of action for which fees are recoverable; and (2) recover damages. *See Mustang Pipeline Co. v. Driver Pipeline Co.*, 134 S.W.3d 195, 201 (Tex. 2004) (per curiam). The only potential cause of action at issue here covered by section 38.001 is breach of contract. But the trial court properly granted summary judgment on Kenyon's breach of contract claim. Thus, the trial court did not err in denying Kenyon's request for attorney's fees. *See id.*

We overrule Kenyon's second issue.

Conclusion

We affirm the trial court's judgment on Kenyon's breach of contract claim and attorney's fees. We reverse the judgment in all other respects and remand for further proceedings consistent with this opinion.

Jennifer Caughey
Justice

Panel consists of Justices Higley, Brown, and Caughey.