Affirmed and Memorandum Opinion filed October 5, 2017.

In The

Fourteenth Court of Appeals

NO. 14-16-00241-CV

REMEDY INTELLIGENT STAFF, INC., Appellant

V.

DRAKE ALLIANCE CORPORATION, Appellee

On Appeal from the 157th District Court
Harris County, Texas
Trial Court Cause No. 2013-04783

M E M O R A N D U M   O P I N I O N

Remedy Intelligent Staff, Inc. appeals the summary judgment granted in favor of Drake Alliance Corporation on Remedy's breach-of-contract claims. Remedy sued Drake to recover defense costs and settlement funds that Remedy paid to an injured Drake employee. Drake moved for summary judgment based on section 417.004 of the Texas Labor Code and on the fair-notice requirements applicable to indemnity agreements. We affirm.

BACKGROUND

Remedy is a personnel staffing company. Beginning in the early 2000s, Remedy began supplying temporary employees to Drake for Drake's production facility in Houston. Though Remedy had written agreements with its larger clients, Remedy and Drake did not operate under a written agreement. Instead, Drake would telephone Remedy and orally place orders for the number of employees needed each day. Drake requested general laborers from Remedy.

The hours worked by the temporary employees were recorded on group time sheets. The group time sheets were preprinted forms provided by Remedy to Drake, and contained terms and conditions on the back of the forms. The terms and conditions included training and supervision provisions, and reciprocal indemnity clauses. Various Drake production shift supervisors signed the front of the time sheets in a box marked "Authorized Customer Signature" to verify the number of hours worked by the temporary employees. Remedy then used the time sheets to generate invoices, which Drake paid. Remedy and Drake operated this way for ten to twelve years.

In 2011, Drake's human resources representative emailed Remedy asking for a copy of the business contract with Remedy and for verification that Drake was listed as an additional insured on certain Remedy insurance policies. As there was no written business contract, Remedy-representative Gail Branch, who was in charge of the Drake account, informed the Drake representative that Drake would need to sign a written contract with Remedy to be added as an additional insured. Remedy then sent to Drake a proposed Standard Client Service Agreement (the "Standard Agreement").

The Standard Agreement contained an indemnity clause and provided for application of California law. The Standard Agreement expressly stated that the

agreement and any attachments would "constitute the entire Agreement and neither the Agreement nor any amendment shall be valid or enforceable unless in writing and signed by authorized representatives of both parties." Neither Drake nor Remedy signed the Standard Agreement.[1] As a result, Remedy did not add Drake as an additional insured to Remedy's insurance policies. Branch stated that Remedy and Drake simply continued doing business as they had before. Drake would place orders for temporary employees over the phone, the temporary employees would record their time on the group time sheets, invoices were then generated, and Drake paid the invoices.

In March 2012, Drake employee Juan Lopez was working at the Drake plant cleaning a machine used to glue labels onto corrugated boxes. A temporary employee supplied by Remedy, Jose Sanchez, was asked to help Lopez with the cleaning by clicking a control to rotate the machine. Lopez alleged that Sanchez, "suddenly and without warning, turned on [the] machine resulting in the amputation of two of [Lopez's] fingers on his right hand." Lopez received workers' compensation benefits through Drake's workers' compensation plan, thereby preventing him from suing Drake.[2] Lopez sued Remedy and Sanchez for the alleged negligent acts and omissions of Sanchez. Remedy defended, and ultimately settled, Lopez's claims.

Remedy filed a third-party petition against Drake seeking indemnity for the amounts paid to Lopez and the cost of defending the suit. Remedy asserted breach-of-contract claims, citing to three purported agreements: the unsigned Standard

[1] Drake maintains that one of its executives expressly told Branch that Drake did not agree to the Standard Agreement, but Branch stated that she did not hear anything back from Drake regarding the agreement. In either case, the proposed Standard Agreement remained unsigned.

[2] *See* Tex. Lab. Code Ann. § 408.001 (workers' compensation benefits are the exclusive remedy for employee against covered employer).

Agreement, an oral contract, and the group time sheets. Remedy pleaded under all three of these alleged agreements that Drake's breaches had damaged Remedy by "the attorney's fees it has incurred defending Lopez'[s] lawsuit, plus whatever damages it becomes obligated to pay, by judgment or settlement, to Lopez." Remedy sought, in the alternative, specific performance of the defense-and-indemnity obligations stated on the back of the time sheets and in the Standard Agreement, and attorney's fees, interest, and costs incurred in prosecuting its claim against Drake.

Drake filed a traditional and no-evidence motion for summary judgment. Drake first argued, based on traditional grounds for summary judgment, that Remedy's claims against it for indemnity were barred as a matter of law by section 417.004 of the Texas Labor Code because Drake had not executed a written agreement with Remedy to assume liability for the damages paid by Remedy to Lopez. Drake also argued on no-evidence summary judgment grounds that there was no evidence of any of the elements required to establish a breach-of-contract claim. Drake further argued, without identifying whether under traditional or no-evidence summary judgment grounds, that the indemnity provisions were unenforceable under the fair-notice requirements of the express-negligence doctrine. The trial court granted summary judgment without specifying the grounds. This appeal followed.

ANALYSIS

Remedy challenges the summary judgment in one *Malooly*[3] point with four sub-issues. In its first two sub-issues, Remedy contends that both traditional and no-evidence summary judgments on its contract claims are improper because either genuine issues of material fact exist with regard to whether an indemnity agreement

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[3] *Malooly Bros., Inc. v. Napier*, 461 S.W.2d 119, 121 (Tex. 1970) (general issue stating trial court erred in granting summary judgment is sufficient to "allow argument as to all the possible grounds upon which summary judgment should have been denied").

existed, or it presented more than a scintilla of evidence that such an agreement existed. Remedy next asserts that the trial court erred in granting a traditional or no-evidence summary judgment based on section 417.004 because its breach-of-contract claims fall outside the scope of that section. Finally, Remedy argues that the trial court erred if it granted summary judgment under the express-negligence doctrine because it did not seek indemnity for its own negligence and, alternatively, the indemnity obligation was clear and conspicuous.

We conclude that the lack of an executed written agreement to reimburse Remedy precludes Remedy's breach-of-contract claims under section 417.004, and that none of its claims fall outside the scope of that section. Because we conclude there is no executed written agreement, we need not reach Remedy's sub-issue challenging application of the express-negligence doctrine.[4] We overrule Remedy's issue on appeal.

A. *Standard of review.*

We review de novo the trial court's ruling on a motion for summary judgment. *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). We consider the evidence in the light most favorable to the non-movant and indulge reasonable inferences and resolve all doubts in its favor. *See City of Keller v. Wilson*, 168 S.W.3d 802, 824 (Tex. 2005); *Wyly v. Integrity Ins. Solutions*, 502 S.W.3d 901, 904 (Tex. App.—Houston [14th Dist.] 2016, no pet.). "We credit evidence favorable to the non-movant if reasonable fact finders could and disregard contrary evidence unless reasonable fact finders could not." *Wyly*, 502 S.W.3d at 904.

[4] *See Cincinnati Life Ins. Co. v. Cates*, 927 S.W.2d 623, 626 (Tex. 1996) (on review of summary judgment, appellate court should consider all grounds that the movant preserved for appellate review that are necessary for final disposition of appeal).

To prevail on a traditional motion for summary judgment, the movant must establish that no genuine issue of material fact exists such that the movant is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Fielding*, 289 S.W.3d at 848. Summary judgment is appropriate if the movant conclusively negates at least one essential element of the plaintiff's claim. *Wyly*, 502 S.W.3d at 905. In a no-evidence motion, the movant must allege that no evidence exists to support one or more essential elements of the non-movant's claim. *See* Tex. R. Civ. P. 166a(i); *Kane v. Cameron Int'l Corp.*, 331 S.W.3d 145, 147 (Tex. App.—Houston [14th Dist.] 2011, no pet.). The non-movant then must present evidence raising a genuine issue of material fact on the challenged element. *Kane*, 331 S.W.3d at 147. If the non-movant fails to present evidence raising a genuine issue of material fact, the trial court must grant summary judgment. *Id.*

B. *Section 417.004 of the Texas Labor Code*.

Section 417.004 of the Texas Labor Code bars claims by third parties for reimbursement against employers who subscribe to workers' compensation insurance. Section 417.004, entitled "Employer Liability to Third Party," provides:

> In an action for damages brought by an injured employee . . . against a third party liable to pay damages for the injury . . . under this chapter that results in a judgment against the third party or a settlement by the third party, the employer is not liable to the third party for reimbursement or damages based on the judgment or settlement unless the employer executed, before the injury . . . occurred, a written agreement with the third party to assume the liability.

Tex. Lab. Code § 417.004.

In *Enserch v. Parker*, the Texas Supreme Court stated that this bar "prohibits indemnity in a workers' compensation context unless one party *expressly agrees* to

indemnify the other *in writing*."[5] 794 S.W.2d 2, 7 (Tex. 1990); *see also Gilbane Bldg. Co. v. Keystone Structural Concrete, Ltd.*, 263 S.W.3d 291, 303 (Tex. App.—Houston [1st Dist.] 2007, no pet.). By requiring an executed written agreement, the Legislature ensured that an employer has "evinced an intent to assume that additional responsibility" before allowing indemnity against the subscribing employer. *See Mullins v. Martinez R.O.W., LLC*, 498 S.W.3d 700, 704 (Tex. App.—Houston [1st Dist.] 2016, no pet.).

It is undisputed in this case that Drake's workers' compensation provider paid benefits to Lopez. Thus, to recover against Drake for "the attorney's fees it has incurred defending Lopez'[s] lawsuit, plus whatever damages it becomes obligated to pay, by judgment or settlement, to Lopez," Remedy must show that Drake executed a written agreement to assume such liability. *See Enserch Corp.*, 794 S.W.2d at 7; *Mullins*, 498 S.W.3d at 702.

1. *Is there an executed written agreement for indemnity?*

In the trial court, Remedy pointed to indemnity language in the proposed, unsigned Standard Agreement and on the back of the group time sheets to support its argument that section 417.004 does not bar its claims. Remedy also argued that Drake and Remedy formed "an implied agreement arising out of the course of performance which Drake and Remedy put into effect together and implemented together over a 10-12 year period." We first note that Remedy's assertion of an "implied agreement arising out of the course of performance" lacks merit because by definition an "implied agreement arising from a course of performance" is not an

[5] Although the court in *Enserch v. Parker* construed the language of a predecessor statute to section 417.004, the court has stated that the revisions to the statute were non-substnative and the language is to be construed the same as the pre-1989 version. *See Energy Serv. Co. of Bowie, Inc. v. Superior Snubbing Servs., Inc.*, 236 S.W.3d 190, 195 (Tex. 2007) (holding that "the most reasonable construction of section 417.004 is the same as its pre-1989 predecessors").

executed written agreement for purposes of section 417.004. We thus address whether Drake could have accepted (and thereby executed) the written proposed Standard Agreement and whether Drake was bound by the written indemnity language on the back of the group time sheets based on actual or apparent authority.

a. *The proposed Standard Agreement was not accepted.*

In its motion for summary judgment, Drake argued that it did not sign the Standard Agreement and as a matter of law the Standard Agreement did not constitute an "executed . . . written agreement." Remedy maintained that, despite the lack of a signature by either party, Drake accepted the Standard Agreement by placing orders for temporary employees after receiving the proposed agreement. We conclude that the lack of the employer's signature on the Standard Agreement establishes as a matter of law that there is no executed written agreement for purposes of section 417.004. We also conclude that there is no evidence of mutual acceptance of the agreement based on conduct, thus precluding any breach-of-contract claim based on the Standard Agreement.

To establish the existence of a valid contract, a party must prove offer and acceptance. *WTG Gas Processing, L.P. v. ConocoPhillips Co.*, 309 S.W.3d 635, 643 (Tex. App.—Houston [14th Dist.] 2010, pet. denied); *see also Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007) (to be enforceable, contracts require mutual assent). Although the question of whether parties intended to be bound often presents a question of fact, it may be determined as a matter of law. *WTG Gas Processing*, 309 S.W.3d at 643. Where the terms of an offer require a certain method of acceptance, the terms of acceptance must be satisfied as prescribed in order to create a contract. *See Padilla v. LaFrance*, 907 S.W.2d 454, 460 (Tex. 1995); *Lujan v. Alorica*, 445 S.W.3d 443, 448 (Tex. App.—El Paso 2014, no pet.). If the contract makes it clear that signatures are required to make the contract binding, then the lack

of a signature will render the contract unenforceable. *See Simmons & Simmons Constr. Co. v. Rea*, 155 Tex. 353, 286 S.W.2d 415, 418–19 (1955); *see also Lujan*, 445 S.W.3d at 449.

The proposed Standard Agreement contains a provision under the heading "Representations and Qualifications" stating that "neither the Agreement nor any amendment shall be valid or enforceable unless in writing *and signed by authorized representatives of both parties*." (emphasis added). The agreement further states: "IN WITNESS WHEREOF, Remedy and Client have caused this Agreement to be executed on the date written above and effective on the "date" set forth below." This sentence is followed by signature blanks prefaced with the word "ACCEPTED" for both the client (Drake) and Remedy. These express terms of the agreement establish that signatures of both representatives were required for the Standard Agreement to be enforceable. *See Rea*, 286 S.W.2d at 419; *Lujan*, 445 S.W.3d at 449; *see also Scaife v. Associated Air Ctr. Inc.*, 100 F.3d 406, 411 (5th Cir. 1996).

The language in the proposed Standard Agreement is similar to that addressed by the court in *Coastal Corp. v. Atlantic Richfield Co.*, 852 S.W.2d 714, 717 (Tex. App.—Corpus Christi 1993, no writ). In that case, the agreement stated "[n]othing in this Agreement shall be binding upon any of the parties until this Agreement is executed by all of the parties by their duly authorized officers." *Id.* Because the parties did not execute the agreement, no written agreement was formed sufficient to satisfy the statute of frauds. *Id.* at 717-18. Likewise, absent signatures from the authorized representatives of Remedy and Drake, the Standard Agreement does not constitute an executed written agreement to reimburse Remedy for purposes of section 417.004. *See id.*

Remedy argues that, despite the lack of signatures on the Standard Agreement, a fact issue exists with regard to whether Drake accepted the terms of the agreement

by placing orders after receiving the proposed agreement. We disagree. Although we have found fact questions exist with regard to acceptance based on part performance, *see, e.g.*, *Murphy v. Seabarge, Ltd.*, 868 S.W.2d 929, 933 (Tex. App.—Houston [14th Dist.] 1994, writ denied), there is no evidence of part performance in this case. Remedy's representative Branch stated that Drake was not required to sign the agreement to continue doing business with Remedy; instead, when Drake did not sign the proposed Standard Agreement, the two parties continued to operate "business as usual." There is no evidence that Drake took any action specific to the Standard Agreement. Branch did not have Drake added as an additional insured. In short, neither party acted as though the Standard Agreement had been accepted.[6]

The proposed agreement was not signed by either Remedy or Drake. The Standard Agreement is not an executed written agreement for purposes of section 417.004 and no evidence of a contract for purposes of Remedy's breach-of- contract claim.

b. *The group time sheets were not signed with actual or apparent authority.*

Remedy also points to the language contained on the back of the group time sheets[7] as evidence of a written indemnity agreement. Drake argued in its motion for summary judgment that the time sheets do not satisfy section 417.004 because there is no evidence that they were signed by a Drake representative with either actual or

[6] Branch's statement that she assumed Drake had accepted the agreement because she did not hear back from them with any objections is not evidence of acceptance of the agreement. "[A]s a general rule, 'silence and inaction will not be construed as an assent to an offer. . . .'" *Tex. Ass'n of Counties Cnty. Gov't Risk Mgmt. Pool v. Matagorda Cnty.*, 52 S.W.3d 128, 132 (Tex. 2000) (quoting 2 WILLISTON ON CONTRACTS § 6:49 (4th ed. 1991)); *see also Advantage Physical Therapy, Inc. v. Cruse*, 165 S.W.3d 21, 26 (Tex. App.—Houston [14th Dist.] 2005, no pet.) ("[A]cceptance by silence is exceptional.") (quotation omitted).

[7] Remedy refers to these forms as time cards. The forms, however, are labeled "Group Time Sheet." We have no documents titled "time cards" in our record. We thus refer to the documents as group time sheets.

apparent authority to enter into an indemnity agreement on behalf of Drake. We agree.

1. *No actual authority.*

Actual authority is that authority delegated to an agent by words of the principal expressly and directly authorizing an agent to do an act on behalf of the principal. *Expro Am., LLC v. Sanguine Gas Exploration, LLC*, 351 S.W.3d 915, 921 (Tex. App.—Houston [14th Dist.] 2011, pet. denied); *see 2616 S. Loop L.L.C. v. Health Source Home Care, Inc.*, 201 S.W.3d 349, 356−57 (Tex. App.—Houston [14th Dist.] 2006, no pet.). Actual authority also contains an implied component. *See 2616 S. Loop L.L.C*, 201 S.W.3d. at 356. Implied actual authority, which exists only as an adjunct to express actual authority, is the authority to do what is necessary and proper to carry out the agent's express powers. *Expro Am.*, 351 S.W.3d at 921.

John Carrico, Drake's chief executive officer, stated without contradiction in his affidavit that the various shift supervisors who signed the time sheets "do not have, and have never had, the authority to enter into binding contractual agreements on behalf of Drake." Instead, only corporate officers of Drake have express actual authority to enter into binding contractual agreements on behalf of Drake. In arguing a fact issue exists, Remedy cites Carrico's deposition testimony that the shift supervisors were authorized to sign the time sheets to verify the hours worked by the temporary employees. Remedy presumably contends that this results in implied actual authority to bind Drake to the indemnity provisions on the back of the forms. We disagree.

Authority to sign the time sheets for purposes of verifying the hours worked does not include authority to bind Drake to the indemnity provisions. The execution of an indemnity agreement is not a necessary or proper part of the express authority given the shift supervisors in signing the time sheets to verify the hours worked by

the temporary employees. *See Expro Americas*, 351 S.W.3d at 924 ("Although [agent] had authority as the company man to determine and request necessary services and to sign job tickets, no evidence supports an inference that execution of indemnity agreements was a necessary and proper facet of his responsibilities."). There is no evidence of actual authority on the part of the shift supervisors to bind Drake to the indemnity provisions on the back of the time sheets.

2. *No apparent authority.*

Nor is there evidence that the shift supervisors had apparent authority to bind Drake to a contract. Apparent authority, which is based on principles of estoppel, arises where a principal has either: (1) knowingly permitted an agent to hold himself out as having authority; or (2) acted with such a lack of ordinary care so as to clothe the agent with the indicia of authority, thus leading a reasonably prudent person to believe the agent has authority. *See Gaines v. Kelly*, 235 S.W.3d 179, 182 (Tex. 2007). Apparent authority is assessed based only on the conduct of the principal, not the agent. *Id.*; *Expro Americas*, 351 S.W.3d at 924. The "principal's full knowledge of all material facts is essential to establish a claim of apparent authority based on estoppel." *Gaines*, 235 S.W.3d at 182; *Rourke v. Garza*, 530 S.W.2d 794, 803 (Tex. 1975), *abrogated on other grounds by Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex. 2007); *Reliant Energy Servs. v. Cotton Valley Compression, L.L.C.*, 336 S.W.3d 764, 784 (Tex. App.—Houston [1st Dist.] 2011, no pet.).

In its motion for summary judgment, Drake argued that there was no evidence of apparent authority and relied upon the testimony of Remedy representative Gail Branch. Branch stated that she understood the shift supervisors had the authority to "approve the time and what was involved with that," but she would not expect shift supervisors to be able to enter an agreement on behalf of Drake "like the client services agreement." In fact, in her sixteen years in the business, she had never seen

a shift supervisor be able to bind a company to an agreement like that. She also stated that no one at a corporate officer level at Drake had ever communicated anything to her to indicate that the production shift supervisors had the authority to enter into an indemnification agreement on behalf of Drake.

Throughout its brief, Remedy repeatedly references that the shift supervisors had authority to sign the time sheets. As discussed above regarding actual authority, the fact that the shift supervisors were authorized to sign the time sheets to verify the hours worked does not of itself equate to authorization to bind Drake to an indemnity agreement. *See Gaines*, 235 S.W.3d at 185 ("Because an agent's authority is presumed to be co-extensive with the business entrusted to his care, it includes only those contracts and acts incidental to the management of the particular business with which he is entrusted.").

The Texas Supreme Court addressed a similar argument in *Rourke*, where a party sought to hold another party liable under an indemnity provision contained on the back of a delivery ticket. 530 S.W.2d at 802. The superintendent in *Rourke* was authorized to sign a delivery ticket verifying a good was received "in good order subject to terms and conditions on the reverse side." *Id.* The reverse side of the delivery ticket included an indemnity clause. *Id.* The court held, as a matter of law, that the authority of a superintendent to sign a delivery ticket did not include the apparent authority to agree to a broad indemnity contract on the back of the form because "the signing of such broad indemnity contracts is not a duty ordinarily entrusted to a person of [the superintendent's] position." *Id.* at 804. As in *Rourke*, signing indemnity agreements is not a duty ordinarily entrusted to the Drake shift supervisors. Branch confirmed that she would not have expected the shift supervisors to be able to agree to indemnity agreements like the client services agreement. There is no evidence that Drake was aware of the indemnity provision

on the back of the time sheets signed by the shift supervisors. The mere signature on the front of the time sheets by the shift supervisors does not show apparent authority to bind Drake to an indemnity obligation contained on the back of the forms *See id.*; *see also Gaines*, 235 S.W.3d at 185.

Remedy also argues that apparent authority exists based on the "participation, acquiescence, or knowledge of Drake in the process that generated the signatures on the Time Cards." Remedy cites to the fact that Drake knew Remedy required an authorized signature on the time sheets in order to generate invoices that Drake then paid.[8] To show apparent authority based on the principal's "participation, acquiescence, or knowledge," however, there must be some evidence that Drake had full knowledge of all material facts at the time of the conduct alleged to constitute the basis of the estoppel. *See Gaines*, 235 S.W.3d at 182; *Rourke*, 530 S.W.2d at 803. Although knowledge can in some instances be imputed, to do so there must be evidence that the party had knowledge of information sufficient to put him upon inquiry, which if reasonably pursued would lead to the discovery of the controlling fact. *See Rourke*, 530 S.W.2d at 803.

It is undisputed that Drake was not aware of the indemnity provision on the back of the time sheets.[9] The time sheets were given by Remedy to the Drake

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[8] On appeal Remedy states for the first time that Drake participated in the process because the time sheets were sent to Drake's management "for review." There is no evidence supporting Remedy's statement that Drake's management reviewed the time sheets before they were sent to Remedy. The record page cited by Remedy is Branch's declaration stating that she sometimes picked the time sheets up from Drake's offices, and that when she picked them up she verified "that there was a signature by Drake in the authorized signature blank and completed hours." This does not establish that Drake's management reviewed the time sheets.

[9] Although Branch stated in her deposition that Remedy should be bound by the indemnity provision because "they were aware of our documents," she did not specify what documents Drake was aware of, or whether those documents contained indemnity provisions. Branch's general statement thus does not controvert the specific statement by Carrico that Drake was not aware of the indemnity provisions on the back of the time sheets. *See Reliant Energy Servs., Inc.*, 336 S.W.3d at 785−86 (trial court properly granted judgment notwithstanding the verdict because

production shift supervisors to track and verify the hours worked by the temporary employees. The completed time sheets were sometimes picked up from Drake's management offices and sometimes faxed to Remedy. There is no evidence of any discussions or negotiations regarding the indemnity provisions or terms located on the back of the time sheets.[10] There is no evidence in the record supporting an inference that indemnity provisions are commonly on the back of time sheets and that Drake thus should have known of the indemnity provisions. *See Expro Americas*, 351 S.W.3d at 926-27 (finding fact issue regarding apparent authority because there was testimony that job tickets often contain terms and conditions on reverse side and experienced operators would know of it).[11] There is no evidence in the record on which to impute knowledge to Drake of the indemnity provision. *See Rourke*, 530 S.W.2d at 803. As a result, there is no evidence of apparent authority of the shift supervisors to bind Drake to an indemnity obligation. *See Gaines*, 235 S.W.3d at 185; *Rourke*, 530 S.W.2d at 803.

c. *No evidence of ratification.*

Remedy also argues that Drake is bound to indemnify it through ratification. Though not clear from its briefing, we presume Remedy's position is that Drake ratified the acts of the production shift supervisors thus binding it to the indemnity provisions on the back of the group time sheets. We again disagree. Like apparent

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testimony created, at most, mere surmise and suspicion and was controverted by specific testimony to contrary).

[10] Remedy references in its brief the signatures by Drake on checks to pay invoices and the existence of invoices, but the checks and invoices are not in the record. There is no evidence of any terms or statements on such checks or invoices that would support an inference that Drake had knowledge of the indemnity provisions.

[11] Remedy stated in the trial court and in this court that a "leading treatise on personnel placement law" notes that unsigned agreements, rate cards, fee schedules and/or time cards can create enforceable agreements, but it does not provide a copy of the treatise nor any testimony or other evidence to support this statement.

authority, ratification requires evidence that Drake had full knowledge of all material facts. *See Rourke*, 530 S.W.2d at 804−05; *see also Peek/Howe Real Estate, Inc. v. Brown & Gay Eng'rs, Inc.*, No. 14-11-00510-CV, 2012 WL 3043026, at *5 (Tex. App.—Houston [14th Dist.] July 26, 2102, no pet.) (mem. op.) ("The critical factors in determining whether a principal has ratified an unauthorized act by his agent are the principal's knowledge of the transaction and its actions in light of such knowledge."). In this case, there is no evidence that Drake actually knew of the indemnity provisions on the back of the time sheets, nor evidence from which such knowledge could be imputed.

Remedy cites *Verizon Corporate Services Corp. v. Kan-Pak Systems, Inc.*, 290 S.W.3d 899 (Tex. App.—Amarillo 2009, no pet.), in support of its ratification argument. In *Verizon Corporate*, a fact issue precluded summary judgment regarding ratification of an agreement because there was evidence supporting an inference that a reasonably prudent business would have investigated the terms of the agreement. *Id.* at 907. There was evidence that put the party on notice of the existence of the terms of the agreement and the court found a "conscious indifference to discovering the terms." *Id.* In contrast, there is no evidence in this case suggesting that Drake was consciously indifferent to the indemnity provisions on the back of the time sheets, nor any evidence of facts that would have put it on notice of the provisions.

Remedy generally argues in multiple parts of its brief that Remedy and Drake conducted business for a ten to twelve year time period based on "rates, requests, time cards, invoices, and checks" resulting in an "integrated writing." Even if "an integrated writing" based on various documents could constitute an executed written agreement under section 417.004, an issue we do not decide, the record shows only that oral requests for temporary workers were made by Drake over the phone

according to various rates quoted by Remedy, the temporary employees filled out the group time sheets that were signed by the shift supervisors, and Drake paid invoices submitted to it by Remedy based on the hours recorded on the time sheets. There is no evidence in the record of written rate cards, checks, or invoices to determine whether any additional terms were on those documents in support of Remedy's argument.[12] Remedy's argument is without merit.

2. *Do any of Remedy's claims fall outside the scope of section 417.004*?

Remedy also asserts the trial court erred in granting summary judgment on its contract claims "because Drake failed to comply with contractual obligations which are distinct from a claim to be reimbursed for a judgment or settlement of the claims by Lopez in this lawsuit." Remedy cites the following alleged breaches of contract: (1) Drake's failure to notify it that Sanchez would be used as a machine operator; (2) Drake's failure to provide training, supervision, or guidance to Sanchez before allowing him to operate a machine; and (3) Drake's failure to pay the rate of a machine operator instead of a general laborer.[13] Relying on *Skillmaster Staffing Services, Inc. v. J.M. Clipper Corp.*, No. H-04-3619, 2006 WL 2385288, at *3 (S.D. Tex. Aug. 17, 2006), Remedy argues its claims fall outside the scope of section 417.004's bar because it could have asserted these claims even had Lopez not been injured.

In *Skillmaster Staffing*, the district court addressed whether section 417.004, and other sections of the workers' compensation statute, barred contract and tort

[12] Throughout its brief Remedy references rate cards, invoices, and checks as evidence of an integrated series of documents, but there are no rate cards, invoices, or checks in the record.

[13] It is not clear from Remedy's briefing whether these alleged contractual obligations arise from the oral agreement between Remedy and Drake or from the terms set forth in the proposed Standard Agreement and the back of the time sheets. As we have held that there was no evidence Drake accepted the proposed Standard Agreement or the terms stated on the back of the time sheets, the only remaining contract would be the oral agreement.

claims asserted by a staffing company against a plant owner. *Id.* at *1. The plant owner had employed one of the staffing company's employees, and the employee was injured while working at the plant. *Id.* The staffing company paid workers' compensation benefits to the injured employee and then sued the plant owner under breach of contract and other tort theories for reimbursement of the benefits paid. *Id.* at *2.

The plant owner moved for summary judgment based on the workers' compensation bar. *Id.* After concluding that the staffing company could not seek reimbursement of the workers' compensation benefits because of the bar, the district court held the staffing company could pursue those damages "that would have existed even if [the injured worker] had never been injured." *Id.* at *3. The court made clear, however, that the staffing company could not obtain reimbursement for the benefits paid simply by asserting the same damages under a different cause of action. *See id.* at *3 n.1 (limiting damages allowed to rate differentials and disallowing any reimbursement of workers' compensation benefits paid as "exacerbated damages" under different theory of recovery); *see also Gilbane*, 263 S.W.3d at 303 (because indemnity provision was unenforceable under fair-notice requirements, claim for same damages under breach-of-contract theory was barred by section 417.004).

Remedy argues it suffered distinct damages in the form of "increased insurance payments" and a lower rate of compensation for use of Sanchez as a machine operator when it charged Drake for a general laborer. The record, however, contains no evidence of increased insurance payments or of any rate differentials.[14]

[14] Remedy cites to Branch's testimony that Remedy charges a higher amount for forklift operators than it does for general laborers because the workers' compensation insurance is more expensive for forklift operators. There is no testimony in the record that Remedy actually suffered rate increases in its own workers' compensation insurance (or any other insurance).

In response to the motion for summary judgment, Remedy cited the trial court to the declaration of its attorney, in which the attorney set forth the amount of attorneys' fees incurred in defending the claims of Lopez and in pursuing its claim for reimbursement from Drake. But that is not evidence of increased insurance premiums or rate-differential damages.

With regard to its breach-of-contract claim for the use of general laborers as machine operators, Remedy specifically pleaded it "has been damaged in the amount of the attorney's fees it has incurred defending Lopez'[s] lawsuit, plus whatever damages it becomes obligated to pay, by judgment or settlement, to Lopez." Thus, Remedy's pleading makes clear that it is pursuing its defense costs and settlement expenses through its breach-of-contract claims. As the court held in *Gilbane*, because Remedy's claim for reimbursement and damages related to the Lopez lawsuit is barred by section 417.004 for lack of a written agreement, any other contract claims seeking the same damages also are barred. *See Gilbane*, 263 S.W.3d at 303; *see also Skillmaster Staffing*, 2006 WL 2385288, at *3 n.1.

Remedy contends that, under the law of special exceptions, the trial court was required to "liberally construe the pleaded allegations to find that the first two breaches of contract claims exist regardless of whether there was an accident involving Lopez or not." We disagree. A special exception is appropriate where a plaintiff omits an element of a claim or does not state its claim with sufficient clarity to inform the defendant of the nature of the suit. *See* Tex. R. Civ. P. 90; *Baylor Univ. v. Sonnichsen*, 221 S.W.3d 632, 635 (Tex. 2007) ("The purpose of a special exception is to compel clarification of pleadings when the pleadings are not clear or sufficiently specific or fail to plead a cause of action."). In such cases, special exceptions should be filed before filing a motion for summary judgment. *See*

Crabtree v. Ray Richey & Co., 682 S.W.2d 727, 728 (Tex. App.—Fort Worth 1985, no writ).

Where a plaintiff pleads a claim and, as pleaded, the claim is subject to an affirmative defense, however, the defendant is not obligated to point out possible claims against it. *Id.* Remedy did not fail to plead an element of its contract claims against Drake. Instead, Remedy specifically pleaded with regard to each breach-of-contract claim that it was seeking reimbursement of its attorney's fees and defense costs as a result of each of its contract claims. In the remedies section of its petition it pleaded: "Remedy seeks, as actual damages, the amount of attorney's fees it has incurred and will incur defending Lopez'[s] claim. Remedy further seeks, as actual damages, all amounts it becomes obligated to pay to Lopez, either by judgment or settlement." The claims, as pleaded, are subject to the bar set forth in section 417.004, as discussed above. Drake was not required to point out additional types of damages for Remedy to plead to avoid the bar and assert a viable claim against it. *See id.* (defendant not required "to file special exceptions which would suggest to plaintiff possible causes of action against the defendant").

CONCLUSION

The trial court properly granted summary judgment on Remedy's claims against Drake. We overrule Remedy's issue on appeal and affirm the trial court's judgment.

/s/ Ken Wise
Justice

Panel consists of Chief Justice Frost and Justices Donovan and Wise.