Fourth Court of Appeals
San Antonio, Texas

DISSENTING OPINION

No. 04-15-00286-CV

CITY OF SAN ANTONIO, acting by and through City Public Service Board ("CPS Energy"), Appellant

v.

TOMMY HARRAL CONSTRUCTION, INC., Appellee

From the County Court at Law No. 2, Bexar County, Texas
Trial Court No. 383269
Honorable Jason Wolff, Judge Presiding

Opinion by: Jason Pulliam, Justice
Dissenting Opinion by: Sandee Bryan Marion, Chief Justice

Sitting: Sandee Bryan Marion, Chief Justice
Marialyn Barnard, Justice
Jason Pulliam, Justice

Delivered and Filed: January 27, 2016

On May 8, 2015, CPS Energy filed a petition for permissive appeal, asserting the trial court granted CPS Energy permission to appeal the trial court's order denying its motion for partial summary judgment because the order "involve[d] a controlling question of law as to which there is a substantial ground for difference of opinion" and "an immediate appeal from the order may materially advance the ultimate termination of the litigation." *See* TEX. R. APP. P. 28.3(e)(4). On May 18, 2015, Tommy Harral Construction, Inc. filed a response to the petition, asserting the issue involved a question of fact as opposed to a controlling question of law. By order dated May 27, 2015, a panel of this court granted CPS Energy's petition, and, as of August 6, 2015, the parties

fully briefed the controlling question of law as identified by the trial court in its order. The appeal was then assigned to a submission panel which differs from the panel that initially granted CPS Energy's petition. The majority has now reconsidered this court's jurisdiction over this appeal and concludes, "Because nothing in the record provides indication of the trial court's determination of the substantive legal issue presented to this court for determination, this permissive appeal does not meet the strict jurisdictional requirements of Section 51.014(d)." Because I disagree, I respectfully dissent.

I agree the trial court is required to make "a substantive ruling on the controlling legal issue being appealed." *Gulley v. State Farm Lloyds*, 350 S.W.3d 204, 207 (Tex. App.—San Antonio 2011, no pet.). I disagree, however, with the majority's conclusion that the record in this case fails to establish the trial court made such a ruling.

The motion for partial summary judgment filed by CPS Energy reads as follows:

> NOW COMES Plaintiff, CITY OF SAN ANTONIO, acting by and through CITY PUBLIC SERVICE BOARD ("CPS ENERGY") and files this its Motion for Partial Summary Judgment pursuant to TRCP Rule 166a and 166a(c) against Defendant TOMMY HARRAL CONSTRUCTION, INC. ("Defendant") and in support of this Motion would respectfully show the Court the following:
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> **BACKGROUND**
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> Defendant damaged and/or destroyed CPS ENERGY's equipment/facility on April 9, 2008 at or near Commerce and Laredo Streets, San Antonio, Texas, by damaging a duct line. Texas law requires that an excavator request that such lines be located prior to digging, however, this line was not located as Defendant never made any request to locate this line. In prior arguments before the Court, Defendant has contended that the actual individual doing the digging is not required under Texas law to request a line locate. This motion seeks partial summary judgment on CPS Energy's declaratory judgment action regarding interpretation of certain provisions of the Texas Utilities Code.
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> **ARGUMENT**
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> Pursuant to the clear language of the relevant statutes, Texas law requires the "excavator" to request a locate before excavating by the method set forth under Texas statutes. Tex. Util. Code. §§ 251.151(a), (c); *see also* 16 Tex. Admin. Code §§ 18.3(a), (e), (f). Further, the Utilities Code explicitly defines an excavator as "a person that excavates or intends to excavate in this state." Tex. Util. Code § 251.002(6). In turn, under the Code Construction Act, "person" is defined as [a]

> "corporation, organization, government or governmental subdivision or agency, business trust, estate, trust, partnership, association, and any other legal entity." Tex. Gov't Code § 311.005(2).
>
> In interpreting statutes, courts are bound by the clear and unambiguous language in the statute. If the legislature has specifically defined a word in the statute, the court is not concerned with the ordinary, legal, or technical meaning of the word; but it will simply apply it as defined, because the statutory definition is binding. *See, e.g., TGS-NOPEC Geophysical Co. v. Combs*, 340 S.W.3d 432, 439 (Tex. 2011).
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> Given the foregoing, it is clear, that "excavator" as used in the Texas Utility Code refers to the individual or entity actually digging at a site and does not extend to a separate contractor working at the same site. Defendant has not presented and cannot present competent evidence to the contrary.
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> Therefore, CPS Energy seeks summary judgment on its claim for relief pursuant to the Declaratory Judgment Act, and specifically asks that the Court find that:
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> 1) pursuant to the terms of Texas Utility Code Sections 251.002(6), 251.151(a), (c), and 16 Texas Administrative Code Section 18.3(a), (e), and (f), the actual entity or person digging is required to provide notification prior to a dig; and that
> 2) "excavator" as used in the Texas Utilities Code, Sections 251.151 *et seq.* and Texas Administrative Code Title 16, Part 1, Chapter 18 *et seq.* refers to the individual or entity actually digging at a site and does not include a separate contractor working at the same site.
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> CPS Energy also seeks, pursuant to Texas Civil Practice and Remedies Code Section 37.009 its reasonable and necessary attorney fees relating to its declaratory judgment action.
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> WHEREFORE, Plaintiff requests this matter be set for hearing with notice to Defendant and that on final hearing of this Motion, the Court enter partial summary judgment and declaratory judgment in favor of Plaintiff. Plaintiff further prays for general relief.

In my opinion, CPS Energy's motion presents only one ground for summary judgment, *i.e.*, that Tommy Harral Construction, as the entity actually digging at the site, was the excavator responsible for providing notice as opposed to a separate contractor working at the site. In denying the motion, the trial court necessarily concluded Tommy Harral Construction was not required to provide the notice because such notice could be provided by a separate contractor working at the site. The trial court's order denying the partial summary judgment on this single issue phrased the controlling question of law as "whether under the Texas Utilities Code and Texas Administrative

Code a general contractor's notification prior to excavation by a subcontractor relieves that subcontractor of the statutory obligation to separately give notice prior to excavating." This controlling question of law mirrors the only ground raised in the motion for partial summary judgment. Accordingly, by denying the motion, the trial court substantively determined the general contractor's notification relieved Tommy Harral Construction of the obligation to separately provide notice, which is the controlling legal issue that has been briefed by the parties.

Although the majority cites numerous cases to support its position, those cases are distinguishable because they involve competing motions for summary judgment or motions for summary judgment in which numerous grounds are raised. For example, in *Borowski v. Ayers*, the motion for summary judgment and the response thereto asserted numerous issues, and the trial court generally denied the motion. 432 S.W.3d 344, 345-36 (Tex. App.—Waco 2013, no pet.). The Waco court dismissed the permissive appeal, noting the controlling question was "really two 'questions'" and the trial court could have denied the motion for summary judgment "for either of the following [two] reasons" which the Waco court then listed. *Id*. at 348. Similarly, in *McCroskey v. Happy State Bank*, No. 07-14-00027-CV, 2014 WL 869577, at *1 & n.2 (Tex. App.—Amarillo Feb. 28, 2014, no pet.) (mem. op.), the parties filed competing motions for summary judgment, and the Amarillo court noted the trial court identified "eight multi-faceted 'controlling questions of law.'" The Amarillo court dismissed the appeal, stating, "Nowhere, however, in the trial court's order or in the appellate record, do we find where the trial court expressly ruled on the substance of those controlling questions of law." *Id*.; *see also Corp. of the Pres. of the Church of Jesus Christ of Latter-Day Saints v. Doe*, No. 13-13-00463-CV, 2013 WL 5593441, at *2 (Tex. App.—Corpus Christi Oct. 10, 2013, no pet.) ("The trial court could have denied the Church's motion on any of the following: (1) the applicable statute of limitations did not bar Doe's claims; (2) duress

tolled the statute of limitations; (3) the continuing-tort doctrine tolled the statute of limitations; or (4) material fact issues prevented the court from granting the motion. Without a substantive ruling by the trial court as to why it denied the Church's motion, no controlling question of law has been presented for our analysis.") (mem. op.); *Double Diamond Delaware, Inc. v. Walkinshaw*, No. 05-13-00893-CV, 2013 WL 5538814, at *1 (Tex. App.—Dallas Oct. 7, 2013, no pet.) (noting both parties moved for partial summary judgment with each raising multiple grounds and trial court denied the order without stating a basis) (mem. op.); *Bank of New York Mellon v. Guzman*, 390 S.W.3d 593, 595 (Tex. App.—Dallas 2012, no pet.) (noting parties filed competing motions for summary judgment raising numerous alternative grounds and trial court denied the competing motions because the parties "failed to satisfy [their] burden"); *Colonial Cty. Mut. Ins. Co. v. Amaya*, 372 S.W.2d 308, 310 (Tex. App.—Dallas 2012, no pet.) ("Because the amended motion for summary judgment addressed the merits of the first amended petition, which included six claims, the court could have denied the motion on the basis that there was an issue of fact regarding whether there was PIP coverage, whether there had been conduct justifying some kind of extracontractual claim, or on some other basis, including because the petition upon which the motion was based had been superseded. But there is nothing in the record showing that the trial court made a substantive ruling on the legal issue we are being asked to decide."). Unlike the cited cases, CPS Energy's motion in this case raised a single ground and could only have been denied based on the trial court's conclusion that the general contractor's notification relieved Tommy Harral Construction of the obligation to separately give notice. Therefore, because the record reflects the trial court's substantive determination of the specific legal issue presented in this appeal, I dissent to the dismissal of this appeal.

Also, in a footnote, the majority suggests "there could be some factual issues in dispute" and alludes to the timeliness of the notice provided by the general contractor and CPS Energy's response to that notice. I believe the timeliness of the notice and any response thereto do not become issues unless the appropriate person provided the notice. Therefore, the controlling legal issue (whether a general contractor is able to provide notice for a subcontractor) is the threshold issue, and our resolution of this controlling legal issue will materially advance the ultimate termination of the litigation. *See* TEX. R. APP. P. 28.3(e)(4). Finally, the majority's suggestion that these "factual issues" might preclude a permissive appeal appears to be advisory, and, as the majority recognizes in its opinion, this court has no jurisdiction to issue advisory opinions. *See Valley Baptist Med. Ctr. v. Gonzalez*, 33 S.W.3d 821, 822 (Tex. 2000) (per curiam).

For the foregoing reasons, I respectfully dissent to the dismissal of this appeal.

Sandee Bryan Marion, Chief Justice