In The

Court of Appeals

Ninth District of Texas at Beaumont

NO. 09-18-00122-CV

AMERIGAS PROPANE, L.P., Appellant

V.

JOSE FRANCISCO ABOYTES-MUÑIZ, ANDY MEDINA-CARDENAS AND BERNABE BUSTILLO-RIVERA, Appellees

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On Appeal from the 284th District Court
Montgomery County, Texas
Trial Cause No. 15-09-09003-CV

MEMORANDUM OPINION

This is a permissive appeal of a grant of a partial no-evidence motion for summary judgment and the denial of a traditional motion for summary judgment in a lawsuit concerning a workplace injury. The Appellees allege that they were injured at AmeriGas Propane, L.P.'s (AmeriGas or Defendant) propane-filling facility in Conroe, Texas. This Court previously entered an order accepting the permissive

appeal. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d), (f) (West Supp. 2018).[1] We reverse and remand.

Background

Underlying Facts

The record before us indicates that AmeriGas Propane, L.P. is a limited partnership organized in Delaware. AmeriGas Propane, Inc. (AG Inc.) is the general partner of AmeriGas Propane, L.P. AmeriGas Propane, L.P. is a subsidiary of UGI Corporation (UGI).

According to the record before us, Defendant AmeriGas Propane, L.P. owns and operates the "AmeriGas Cylinder Exchange" facility in Conroe, Texas, where, as AmeriGas explains, empty propane tanks are delivered, cleaned, refilled with propane, and redistributed for sale. On November 6, 2012, while workers at the AmeriGas Cylinder Exchange were refilling the tanks, gas escaped, ignited, and caused a fire. Several of the workers, including Roberto Cabrera (Roberto), Jose Francisco Aboytes-Muñiz (Jose), Andy Medina-Cardenas (Andy), and Bernabe Bustillo Rivera (Bernabe) allege they sustained injuries from the accident.

[1] We cite to current statutes herein unless subsequent amendments affect our disposition.

In August of 2015, Roberto filed an original petition against defendant AmeriGas Propane, L.P., alleging that he was injured at the AmeriGas facility and asserting tort claims against AmeriGas. Appellant and Appellees state in their briefs that AmeriGas Propane, L.P. and Roberto settled and therefore Roberto is not a party to this appeal. We discuss any other facts relating to Roberto herein only as necessary to the issues on appeal.

In September of 2015, Jose, Andy, and Bernabe (collectively "Intervenors") filed petitions in intervention in Roberto's lawsuit against AmeriGas. In their petitions, Intervenors alleged claims against AmeriGas for premises liability, negligence, and gross negligence arising out of the accident. AmeriGas filed an answer and asserted a general denial and affirmative defenses of statute of limitations and exclusive remedy under the Texas Workers' Compensation Act (TWCA).

No-Evidence Motion for Summary Judgment

In 2016, Roberto filed a no-evidence motion for partial summary judgment, which was joined by the Intervenors, in which Roberto and the Intervenors argued that "[t]here is no evidence that AmeriGas Propane, L.P., was a named insured subscriber to a policy of workers' compensation insurance at the time of the incident made the basis of this suit." AmeriGas filed a response and a counter-motion for

summary judgment as to Roberto only. AmeriGas explained in its response that it is a subsidiary of the parent corporation UGI, which operates various energy and utilities businesses. AmeriGas alleged that UGI's domestic propane business is conducted through AmeriGas, and that AmeriGas's general partner is AG Inc. According to AmeriGas, it is the operating partnership and holds title to the real property involved in the accident at issue in this lawsuit. But, AG Inc. manages AmeriGas's operations and payroll and executes contracts on behalf of AmeriGas. According to AmeriGas, it can only act through AG Inc., its general partner.

AmeriGas argued that it was insured under a workers' compensation policy obtained by UGI and issued by ACE Indemnity Insurance Company of North America (ACE), policy number C46784583, and the policy did not specifically name AmeriGas as a named insured due only to an administrative error. AmeriGas further argued that it paid insurance premiums on policy C46784583, that an endorsement was issued at a later date naming AmeriGas as a named insured on policy C46784583 in order to correct the administrative error, and that AmeriGas had paid and Roberto had accepted over $500,000 in workers' compensation benefits under policy C46784583. AmeriGas supported its response and counter-motion with affidavits and documents.

Intervenors filed a reply in which they argued that policy C46784583 named UGI Corporation and AmeriGas Propane, Inc., but not AmeriGas Propane, L.P. Intervenors also argued that the endorsement that was added to the UGI policy in 2016 was an attempt to "retroactively change the policy" three years after the policy had expired. The Intervenors attached an affidavit from Brad McClellan, an attorney who is board certified in workers' compensation law, who opined that the mutual mistake argument and the retroactive revision to the UGI policy should not be allowed. The trial court entered an Order dated November 28, 2017, granting Plaintiff and Intervenors' partial no-evidence motion for summary judgment and denying AmeriGas's counter-motion for traditional summary judgment as to Roberto.

AmeriGas's Traditional Motion for Summary Judgment as to Intervenors

Thereafter, AmeriGas filed a traditional motion for summary judgment on the Intervenors' claims, which incorporated by reference evidence and pleadings previously submitted with its response to the partial summary judgment and counter-motion against Roberto. AmeriGas argued that, at the time of the incident, Intervenors were employed by F.W. Services, Inc., which was doing business as Pacesetter Personnel Services (Pacesetter). According to AmeriGas, Pacesetter had a workers' compensation policy that covered the Intervenors, and the policy

contained an "Alternate Employer Endorsement" that states that workers' compensation "will apply as though the alternate employer is insured." AmeriGas also argued it had workers' compensation coverage through its own insurer at the time of the incident. AmeriGas attached additional affidavits and documents as evidence of coverage under its own policy, including a certificate of insurance, information from the underwriting file, and AmeriGas's payroll data used to determine premiums.

Jose filed a response to AmeriGas's motion for summary judgment in which he argued that AmeriGas cannot claim coverage under Pacesetter's workers' compensation policy because Pacesetter and AmeriGas did not execute a written staff leasing contract and the Alternate Employer Endorsement does not name or refer to AmeriGas. Jose also argued that AmeriGas's motion for summary judgment merely restated the same arguments and presented the same evidence that the trial court had already considered and rejected. Jose asserted that "[i]t is undisputed that AmeriGas Propane, L.P. was not listed as a named insured on a workers' compensation policy at the time these workers were injured[]" as required by law.

Andy and Bernabe also filed a joint response to AmeriGas's motion for summary judgment. Therein, Andy and Bernabe argued that the question whether AmeriGas had workers' compensation insurance at the time of the incident had

already been decided in the Intervenors' favor. Andy and Bernabe also argued that any evidence concerning Pacesetter's workers' compensation policy was untimely filed and should be excluded. The Intervenors argued that the Alternate Employer Endorsement in Pacesetter's policy does not apply to AmeriGas by its plain terms because there was no evidence of a staff leasing services agreement between Pacesetter and AmeriGas, and there was no evidence that Pacesetter held a staff leasing license.

AmeriGas contends that the Intervenors were employees of Pacesetter and borrowed servants of AmeriGas. In contrast, the Intervenors collectively argue that they were hired by Pacesetter but sent to the AmeriGas facility where they worked as "long-term employees" of AmeriGas. AmeriGas further contends that it was the Intervenors' "alternate employer[]" and that it supervised the Intervenors, controlled the details of their work, and owned the premises and equipment where the work was performed.

In his response to AmeriGas's motion for summary judgment, Jose agreed that AmeriGas supervised and controlled the work site and his work but Jose argued he was a "long-term employee" of AmeriGas. Jose testified in his deposition that he was employed by Pacesetter but AmeriGas employees were his bosses. In his amended petition, he alleged that "[a]t all times material to this case, AmeriGas

Propane, L.P., employed [Jose] to work at a liquid propane cylinder filling facility in Conroe, Montgomery County, Texas."

In their response to AmeriGas's motion for summary judgment, Andy and Bernabe argued that their continuous employment for about half a decade at the AmeriGas facility reflected that their employment was "long-term or continuing" and not "temporary." In his deposition, Andy testified that his paychecks came from Pacesetter, but he received them at the AmeriGas offices and he had never been to Pacesetter's office. Bernabe testified that he worked at AmeriGas about six years before the accident and that he did not know who Pacesetter was.

Mark Birenbaum, Vice President of the Payroll Division for Pacesetter, attested in his affidavit that Pacesetter's records show that Andy and Bernabe were hired by Pacesetter and assigned to work at AmeriGas in Conroe. Birenbaum also stated that when Pacesetter's employees are employed at third-party facilities, the third-party client directs, controls, and supervises the work. Steven Richard, Operations Manager for AmeriGas in Conroe, attested in his affidavit that he supervised the activities of Andy and Bernabe at the time of the incident.

Order Denying AmeriGas's Motion for Summary Judgment and Granting Permissive Appeal

AmeriGas filed a motion for reconsideration of the trial court's November 28, 2017 order granting Roberto's and the Intervenors' no-evidence motion for partial

summary judgment and, as an alternative, a motion to amend the order dated November 28, 2017, to certify the question for interlocutory appeal. In March of 2018, the trial court signed an order denying AmeriGas's traditional motion for summary judgment, denying AmeriGas's motion for reconsideration as to the grant of the partial summary judgment filed by the Intervenor, and amending the November 28, 2017 order to allow for an interlocutory appeal. The trial court then granted an interlocutory appeal and identified the following controlling questions of law for appeal:

> Whether AmeriGas Propane, L.P., was an insured on November 6, 2012, under the workers' compensation policy issued to FW Services, Inc., and is therefore entitled to assert the exclusive remedy provision of the Texas Worker s' Compensation Act[; and]
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> . . . .
>
> Whether AmeriGas Propane, L.P., was an insured on November 6, 2012, under the workers' compensation policy issued to UGI Corporation and is therefore entitled to assert the exclusive remedy provision of the Texas Workers' Compensation Act.

The trial court further stated:

> The basis for the court's rulings herein is that defendant has offered no evidence that it was covered under a policy of workers' compensation insurance on the date the intervenors were injured, and therefore, defendant is not entitled to assert the exclusive remedy defense of the Texas Workers' Compensation Act.

Standard of Review

Unless a statute specifically authorizes an interlocutory appeal, appellate courts have jurisdiction only over final judgments. *Cherokee Water Co. v. Ross*, 698 S.W.2d 363, 365 (Tex. 1985). Generally, a party may not appeal from a trial court's denial of a motion for summary judgment or grant of a partial summary judgment because such rulings do not constitute a final judgment. *Frias v. Atl. Richfield Co.*, 999 S.W.2d 97, 101 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). Section 51.014 of the Texas Civil Practice and Remedies Code designates civil orders that may be appealed on an interlocutory basis, and it is strictly construed. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014; *Bally Total Fitness Corp. v. Jackson*, 53 S.W.3d 352, 355 (Tex. 2001). Section 51.014(d) permits an interlocutory appeal of an otherwise unappealable order, including the denial of a summary judgment motion, upon the trial court's certification of the statutory requirements, that is, the order involves a controlling question of law on which there is substantial ground for disagreement and an immediate appeal may materially advance the ultimate resolution of the case. *See* Tex. Civ. Prac. & Rem. Code Ann. § 51.014(d). A court of appeals has discretion to accept or refuse to hear a permissive appeal. *Id.* § 51.014(f). This Court previously entered an order accepting the permissive appeal, and we have jurisdiction over this appeal pursuant to Texas Civil Practice and

Remedies Code sections 51.014(d) and 51.014(f). The scope of the permissive appeal is limited to consideration of the controlling issues identified in the trial court's order. *See Tex. Windstorm Ins. Ass'n v. Jones*, 512 S.W.3d 545, 552 (Tex. App.—Houston [1st Dist.] 2016, no pet.) (citing *CMH Homes v. Perez*, 340 S.W.3d 444, 447 (Tex. 2011)).

We review a summary judgment de novo. *See HCBeck, Ltd. v. Rice*, 284 S.W.3d 349, 352 (Tex. 2009) (citing *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005)); *Mid-Century Ins. Co. v. Ademaj*, 243 S.W.3d 618, 621 (Tex. 2007). When we review a traditional summary judgment, we determine whether the defendant conclusively disproved an element of the plaintiff's claim or conclusively proved every element of an affirmative defense. *Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997); *Smith v. Deneve*, 285 S.W.3d 904, 909 (Tex. App.—Dallas 2009, no pet.); *see also* Tex. R. Civ. P. 166a(c). We take evidence favorable to the nonmovant in a motion for summary judgment as true, and we indulge every reasonable inference and resolve every doubt in favor of the nonmovant. *Sysco Food Servs., Inc. v. Trapnell*, 890 S.W.2d 796, 800 (Tex. 1994). The trial court may consider all competent evidence on file at the time of the summary judgment hearing. *See* Tex. R. Civ. P. 166a; *Lance v. Robinson*, 543 S.W.3d 723, 732 (Tex. 2018) (explaining that a trial court does not err by relying on summary judgment evidence

on file prior to the summary judgment hearing even though filed prior to the instant summary judgment record).[2]

A partial summary judgment is interlocutory and becomes final upon disposition of the other issues in the case. *See Hyundai Motor Co. v. Alvarado*, 892 S.W.2d 853, 855 (Tex. 1995); *Chase Manhattan Bank, N.A. v. Lindsay*, 787 S.W.2d 51, 53 (Tex. 1990). A trial court has the inherent right to change or modify any interlocutory order or judgment until the judgment on the merits of the case becomes final. *Flagstar Bank, FSB v. Walker*, 451 S.W.3d 490, 504 (Tex. App.—Dallas 2014, no pet.). Accordingly, a trial court may, in the exercise of discretion, properly grant summary judgment after having previously denied summary judgment without a motion by or prior notice to the parties as long as the court retains jurisdiction over the case. *See H.S.M. Acquisitions, Inc. v. West*, 917 S.W.2d 872, 877 (Tex. App.—Corpus Christi 1996, writ denied); *see also Woods MFI, LLC v. PlainsCapital Bank*,

[2] *See also, e.g.*, *Kastner v. Jenkens & Gilchrist, P.C.*, 231 S.W.3d 571, 581 (Tex. App.—Dallas 2007, no pet.) (noting that the rules "do not require that summary judgment evidence be physically attached to the motion[]"); *R.I.O. Sys., Inc. v. Union Carbide Corp.*, 780 S.W.2d 489, 492 (Tex. App.—Corpus Christi 1989, writ denied) (holding evidence on file prior to the summary judgment hearing, including documents attached to an earlier motion for summary judgment, were proper summary judgment evidence); *Vaughn v. Burroughs Corp.*, 705 S.W.2d 246, 248 (Tex. App.—Houston [14th Dist.] 1986, no writ) (same); *Dousson v. Disch*, 629 S.W.2d 111, 112 (Tex. App.—Dallas 1981, writ dism'd w.o.j.) (holding documents filed four months before summary judgment motion were proper summary judgment evidence).

No. 14-15-00655-CV, 2016 Tex. App. LEXIS 11785, at *35 (Tex. App.—Houston [14th Dist.] Nov. 1, 2016, pet. denied) (mem. op.) (explaining that an interlocutory summary judgment order may be reconsidered at any time, even without notice to the parties).

Texas Workers' Compensation Act

The TWCA permits a subscribing employer's injured employee to recover benefits for work-related injuries on a no-fault basis. *See* Tex. Lab. Code Ann. § 406.031 (West 2015). The TWCA was intended to benefit both employees and employers. *See Port Elevator-Brownsville, L.L.C. v. Casados*, 358 S.W.3d 238, 241 (Tex. 2012).

> The [TWCA] was adopted to provide prompt remuneration to employees who sustain injuries in the course and scope of their employment. . . . The act relieves employees of the burden of proving their employer's negligence, and instead provides timely compensation for injuries sustained on-the-job. . . . In exchange for this prompt recovery, the act prohibits an employee from seeking common-law remedies from his employer, as well as his employer's agents, servants, and employees, for personal injuries sustained in the course and scope of his employment.

Wingfoot Enters. v. Alvarado, 111 S.W.3d 134, 142 (Tex. 2003) (quoting *Hughes Wood Prods., Inc. v. Wagner*, 18 S.W.3d 202, 206-07 (Tex. 2000) (citations omitted)). Courts "construe the TWCA liberally in favor of coverage as a means of

affording employees the protections the Legislature created." *Casados*, 358 S.W.3d at 241.

"Recovery of workers' compensation benefits is the exclusive remedy of an employee covered by workers' compensation insurance coverage . . . against the employer . . . for . . . a work-related injury sustained by the employee." Tex. Lab. Code Ann. § 408.001(a) (West 2015). To establish entitlement to a summary judgment on the affirmative defense of the workers' compensation exclusive remedy, a defendant must prove that at the time of the work-related injury (1) the injured worker was an employee or borrowed servant of the defendant; and (2) the defendant had workers' compensation insurance at the time of the accident. *See Garza v. Exel Logistics, Inc.*, 161 S.W.3d 473, 475-77 (Tex. 2005); *Warnke v. Nabors Drilling USA, L.P.*, 358 S.W.3d 338, 343 (Tex. App.—Houston [1st Dist.] 2011, no pet.) (op. on reh'g).

Were the Intervenors "Employees" of AmeriGas under the TWCA?

The evidence shows that Pacesetter hired Intervenors and assigned them to work at the AmeriGas facility for AmeriGas, but AmeriGas controlled the details of the work performed by Intervenors at the AmeriGas Facility. By the express terms of the employment agreements between Intervenors and Pacesetter, the Intervenors were informed that "[t]he entity to which you are assigned is able to direct and

control your activities that happen at the work site." The Intervenors stated in their pleadings that they were AmeriGas's employees:

> At all times material to this case, AmeriGas Propane, L.P.[] employed [Intervenors] [Andy] and [Bernabe] to work at a liquid propane cylinder filling facility in Conroe, Montgomery County, Texas. . . . As employees of AmeriGas, [Andy] and [Bernabe] were invitees on the AmeriGas premises.
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> At all times material to this case, AmeriGas Propane, L.P. employed [Intervenor] [Jose] to work at a liquid propane cylinder filling facility in Conroe, Montgomery County, Texas. . . . As an employee of AmeriGas, [Jose] was an invitee on the AmeriGas premises.

Under the TWCA, an employee may have more than one employer, and each employer who subscribes to workers' compensation insurance may raise the exclusive remedy provision as a bar to the employee's claims. *See Casados*, 358 S.W.3d at 242; *Alvarado*, 111 S.W.3d at 140. If an employee of a staffing agency is injured while working under a client company's direct supervision, the employee can pursue workers' compensation benefits from either the staffing agency or the client company—and be subject to the exclusive remedy provision as to both—if each provided coverage. *See Mosqueda v. G & H Diversified Mfg., Inc.*, 223 S.W.3d 571, 582 (Tex. App.—Houston [14th Dist.] 2007, pet. denied); *see also Garza*, 161 S.W.3d at 475.

We conclude that there is no disputed material issue of fact concerning whether AmeriGas was an employer of the Intervenors under the TWCA. Even after

considering the undisputed evidence in a light most favorable to the nonmovants, the evidence established that AmeriGas had the right to control the Intervenors' work. *See Garza*, 161 S.W.3d at 477; *Trapnell*, 890 S.W.2d at 800. Not only did the Intervenors not dispute AmeriGas's evidence pertaining to control by AmeriGas, but also, they admitted in their pleadings they were employees of AmeriGas. Consequently, the Intervenors were "employees" of AmeriGas for purposes of the TWCA. *See Alvarado*, 111 S.W.3d at 141.

Did AmeriGas Have Coverage Under a Workers' Compensation Policy at the Time of the Accident?

To be entitled to the TWCA exclusive remedy defense AmeriGas must also prove it had workers' compensation coverage at the time of the incident. *See* Tex. Lab. Code Ann. § 408.001(a); *Garza*, 161 S.W.3d at 475. In its motion for summary judgment, AmeriGas argued that it was covered by the Pacesetter workers' compensation policy under the "Alternate Employer Endorsement" in the Pacesetter Policy. AmeriGas also argued that it had coverage under the UGI workers' compensation policy.

AmeriGas admitted that the UGI policy did not list AmeriGas Propane, L.P. as a named insured but argued the failure to list AmeriGas Propane, L.P. was due to a mistake or an "administrative error" by the insurer, and AmeriGas was inadvertently omitted as a named insured on the policy document. The UGI policy

AmeriGas submitted with its counter-motion against Plaintiff and incorporated into the traditional motion by reference, specifically named "UGI Corporation" and "AmeriGas Propane, Inc." as named insureds. AmeriGas also argued in its cross-motion for summary judgment that "Roberto [] and three Intervenors . . . combined, have collected approximately one million dollars in workers' compensation benefits" as a result of the fire.

Was AmeriGas an Insured on November 6, 2012, Under the Workers' Compensation Policy Issued to UGI and AmeriGas Inc., and Therefore Entitled to Assert the Exclusive Remedy Provision of the TWCA?

Intervenors' argue that, as a matter of law, there is no evidence that coverage existed for AmeriGas under the UGI policy at the time of the injury. Intervenors contend that, in determining whether coverage exists, "[a] court is limited to the four-corners of the document, unless the document is ambiguous." The Intervenors assert that the UGI policy unambiguously does not list AmeriGas as a name insured. AmeriGas argues that a defendant may prove coverage under a workers' compensation policy with affidavits of coverage from an insurer, or a certificate of insurance, or an affidavit from the defendant itself. *See, e.g.*, *Guevara v. WCA Waste Corp. of Tex., L.P.*, No. 01-15-01075-CV, 2017 Tex. App. LEXIS 3650, at **12-14 (Tex. App.—Houston [1st Dist.] Apr. 25, 2017, pet. dism'd) (mem. op.) (explaining that the parties "were not required to produce the actual policy to prove [the

employer] had coverage; they were permitted to prove [] subscriber status with other evidence, such as affidavits[]"); *Warnke*, 358 S.W.3d at 344 (concluding that an affidavit from an insurance carrier's managing director attesting to coverage satisfied the employer's burden to demonstrate subscriber status). AmeriGas argues that the omission of AmeriGas's name from the UGI policy was the result of a mistake or an administrative error, and that AmeriGas provided uncontroverted evidence that established as a matter of law it had coverage under the UGI policy, or alternatively they presented some evidence that would create a fact issue as to whether they had coverage under the UGI policy.

Generally, parol evidence is inadmissible to vary or contradict the terms of an unambiguous instrument. *Dyer v. Cotton*, 333 S.W.3d 703, 718 (Tex. App.—Houston [1st Dist.] 2010, no pet.). However, parol evidence *is* admissible to demonstrate that, through fraud, accident, or mutual mistake, the instrument does not reflect the parties' true intentions. *See Williams v. Glash*, 789 S.W.2d 261, 264 (Tex. 1990); *Atlantic Lloyds Ins. Co. of Tex. v. Butler*, 137 S.W.3d 199, 212-13 (Tex. App.—Houston [1st Dist.] 2004, pet. denied); *Marcuz v. Marcuz*, 857 S.W.2d 623, 627 (Tex. App.—Houston [1st Dist.] 1993, no writ). A mutual mistake occurs when the parties to an agreement have a common intention, but the written contract does not reflect that intent. *Marcuz*, 857 S.W.2d at 627; *Goff v. Southmost Sav. & Loan*

Ass'n, 758 S.W.2d 822, 826 (Tex. App.—Corpus Christi 1988, writ denied). To prove mutual mistake, a party must show (1) the parties' true agreement, and (2) that the instrument incorrectly reflects that agreement because of a mutual mistake. *Butler*, 137 S.W.3d at 213.

In this case, AmeriGas submitted evidence that ACE, UGI, and AmeriGas intended that AmeriGas be covered by the UGI policy at the time the policy was issued. Thomas Groves, Vice President and underwriter at ACE, attested that the UGI policy in effect on November 6, 2012, was intended to include AmeriGas as an insured along with UGI and AG Inc., and that the only reason AmeriGas was not specifically listed as a named insured on the policy was due to an administrative error on the part of ACE. In his deposition, Groves testified that in his review of the underwriting file, he saw combined payroll submission data for "AmeriGas" that was not split out for the various AmeriGas entities—AmeriGas Propane, Inc., AmeriGas Propane, L.P., and AmeriGas Partners, L.P. According to Groves, the UGI policy was priced to include "all entities of AmeriGas[]" and the policy should have provided workers' compensation coverage to AmeriGas. Groves testified that the endorsement executed in 2016 was intended to correct the mistake because the underwriting file reflected that AmeriGas should have been included in the 2012 policy. Groves also testified that the policy was priced and rated to include

AmeriGas and that AmeriGas had paid a premium to ACE for workers' compensation coverage for July of 2012 to July of 2013. AmeriGas also submitted a copy of a "Policy Information Page Endorsement" for the UGI policy that was executed in 2016, which stated a policy period of "07-01-2012 to 07-01-2013[,]" and named "AmeriGas Propane, L.P." as an insured.

AmeriGas submitted an affidavit by Paul Monaco, Risk Manager for UGI, wherein he attested that the UGI policy in effect on November 6, 2012, provided workers' compensation coverage to AmeriGas. In his deposition, Monaco testified that the UGI policy was intended "to provide total protection for all employees of AmeriGas Propane."

An affidavit and deposition transcript of Kathleen McGlynn, Manager of Risk and Corporate Insurance at UGI, was also submitted by AmeriGas. McGlynn stated that AmeriGas had paid premiums to Marsh USA, Inc. for workers' compensation insurance for the period July 1, 2012 through July 1, 2013, and she testified that Marsh was the broker that negotiated the policy terms. McGlynn identified certain documents as records of premiums paid for this policy period, and these documents were also submitted as summary judgment evidence.

AmeriGas argues that "[a]ll injured parties applied for and promptly received workers' compensation benefits." However, AmeriGas does not cite to evidence in

the record of payments it made to the Intervenors. In its counter-motion for summary judgment against Plaintiff Roberto Cabrera, which is incorporated by reference in its motion for summary judgment against the Intervenors, AmeriGas alleged that it had paid benefits to Roberto under the UGI workers' compensation policy. Paul Monaco attested that Roberto had received workers' compensation benefits under the UGI policy arising out of his on-the-job injury on November 6, 2012. In his deposition, Monaco testified that "we have paid out over $400,000 in benefits[]" to Roberto for the injury he sustained.

Kathleen McGlynn stated in her affidavit that AmeriGas had paid over $400,000 in medical and indemnity benefits to Roberto under the UGI policy, and that AmeriGas contracted with Sedgwick Claims Management Services, Inc. (Sedgwick) to serve as its third-party administrator on the UGI worker's compensation policy. Attached to McGlynn's affidavit were copies of Sedgwick invoices to AmeriGas for payments made to Roberto, bank wire transfer authorizations from AmeriGas to Sedgwick, and bank wire transfer transactions from AmeriGas to Sedgwick. McGlynn attested that, pursuant to the workers' compensation policy, AmeriGas had a $500,000 deductible. In her deposition, McGlynn identified an exhibit as invoices for payments made on behalf of AmeriGas by Sedgwick, and one page showed a total of "982,274.64[,]" Roberto's name, and

the other names were redacted. An invoice from Sedgwick to AmeriGas for the Activity Period of November 2012 noted "OK to pay[,]" and the invoice total of "$982,274.64[,]" exceeds the deductible amount of $500,000. McGlynn also identified another exhibit as an internal corporate insurance document that allocated invoice amounts dated "12/3/2012" for AmeriGas by line of business and insurance type and reflected a total of $982,274.64. In addition, McGlynn identified another exhibit as a bank statement showing the wire transfer in the amount of $982,274.64 paid from the AmeriGas bank account to Sedgwick. The exhibit included copies of other bank transfers from AmeriGas to Sedgwick, including one for $1,249,570.54 dated May 21, 2013.

The Intervenors did not dispute the evidence of workers' compensation payments being made under the UGI policy to Roberto, nor did the Intervenors deny that they had also applied for and received workers' compensation benefits under a policy. What remains unclear based on the record before us is whether Intervenors applied for and received workers' compensation payments from the UGI policy or the Pacesetter policy. That said, the record includes undisputed evidence of payments made under UGI's workers' compensation policy to Roberto for injuries he sustained on November 6, 2012 at AmeriGas's facility and total payments have been made exceeding the policy deductible. Evidence of these payments provides

undisputed evidence that the UGI workers' compensation policy provided workers' compensation coverage for AmeriGas even though AmeriGas was not specifically named as an insured on the original policy. *Cf. Haws & Garrett Gen. Contractors, Inc., v. Gorbett Bros. Welding Co., Inc.*, 480 S.W.2d 607, 609 (Tex. 1972) (the parties' agreement may be "implied from and evidenced by their conduct and course of dealing[]"); *Se. Tex. Homecare Specialists, Inc. v. Triangle Billing, Inc.*, 43 S.W.3d 106, 110 (Tex. App.—Beaumont 2001, no pet.) ("[A] party's intent may be inferred from his subsequent acts."); Restatement (Second) of Contracts § 202(4) (Am. Law Inst. 1981) ("Where an agreement involves repeated occasions for performance by either party with knowledge of the nature of the performance and opportunity for objection to it by the other, any course of performance accepted or acquiesced in without objection is given great weight in the interpretation of the agreement.").

In addition to evidence of workers' compensation benefits having been paid to Roberto under the UGI policy, the record also includes undisputed evidence that ACE, UGI, and AmeriGas intended that AmeriGas be covered under UGI's corporate workers' compensation policy, that AmeriGas was not listed as a named insured due to an administrative error, that the policy was priced and rated to include AmeriGas, that AmeriGas paid premiums for coverage under the policy, and that

after the administrative error was discovered in this litigation, an endorsement was executed in accordance with the original underwriting file to correct the error. On this record, we conclude that AmeriGas's summary judgment evidence reflects that the parties' true agreement was to cover AmeriGas as an insured, but that due to a mutual mistake, the policy document did not reflect the parties' true intent. *See Butler*, 137 S.W.3d at 213; *Goff*, 758 S.W.2d at 826 (concluding that where lending institution's name was inadvertently typed in the space for the borrower's name, the mistake was in the expression of the contract and parol evidence was admissible to prove the parties' intent). The parties to the UGI insurance contract agreed: AmeriGas, UGI, and ACE had a contract in which ACE provided workers' compensation coverage to AmeriGas at the time of incident forming the basis of Intervenors' claims. *See First Bank v. Brumitt*, 519 S.W.3d 95, 99 (Tex. 2017) ("only 'the parties to an agreement determine its terms'") (quoting *Royston, Rayzor, Vickery, & Williams, LLP v. Lopez*, 467 S.W.3d 494, 503-04 (Tex. 2015)); *Trahan v. Premcor Ref. Grp. Inc.*, No. 09-17-00005-CV, 2018 Tex. App. LEXIS 6493, at *14 (Tex. App.—Beaumont Aug. 16, 2018, pet. denied) (mem. op.).[3]

[3] "A 'scrivener's failure to embody the true agreement of the parties in a written instrument' provides grounds for the equitable remedy of 'reformation on the basis of mutual mistake.'" *Samson Expl., LLC v. T.S. Reed Props., Inc.*, 521 S.W.3d 766, 779 (Tex. 2017) (quoting *Gail v. Berry*, 343 S.W.3d 520, 524 (Tex. App.—Eastland 2011, pet. denied)). "[R]eformation requires two elements: (1) an

Once AmeriGas provided such evidence as outlined above regarding the UGI policy, the burden shifted to the Intervenors to disprove or raise an issue of fact as to at least one element of AmeriGas's defense. *See Trahan*, 2018 Tex. App. LEXIS 6493, at *8 (citing *Amedisys, Inc. v. Kingwood Home Health Care, LLC*, 437 S.W.3d 507, 511 (Tex. 2014)). Here, the Intervenors did not dispute the evidence AmeriGas submitted. The uncontradicted evidence included payroll and employment information, testimony and documentation showing AmeriGas paid premiums for such coverage, and documents and testimony establishing that Roberto's claims were administered and paid under the UGI policy. The Intervenors failed to disprove or raise a fact issue as to at least one element of the defense raised by AmeriGas and, therefore Intervenors failed to carry their burden of proof once the burden shifted to them. *See id.* at *12.

We conclude that, as a matter of law, AmeriGas was covered by a workers' compensation policy and AmeriGas was the Intervenors' employer for purposes of the TWCA. *See id.* at **12-17 (concluding that undisputed evidence of submission of payroll and employment information, payment of premiums, and payment and receipt of workers' compensation established coverage under the TWCA and barred

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original agreement and (2) a mutual mistake, made after the original agreement, in reducing the original agreement to writing." *Cherokee Water Co. v. Forderhause*, 741 S.W.2d 377, 379 (Tex. 1987) (emphasis omitted).

an employee's negligence claims). Therefore, AmeriGas is entitled to assert the TWCA's exclusive-remedy defense. *See Garza*, 161 S.W.3d at 475-77; *Trahan*, 2018 Tex. App. LEXIS 6493, at **15-16.

Because we have concluded that the summary judgment evidence supports a conclusion that on November 6, 2012, AmeriGas was an insured under the workers' compensation policy issued to UGI Corporation, we need not determine whether AmeriGas was also an "alternate employer" and entitled to coverage under F.W. Services, Inc.'s policy because determination of the latter issue would not result in any greater relief. *See Ho v. Johnson*, No. 09-15-00077-CV, 2016 Tex. App. LEXIS 1668, at *46 (Tex. App.—Beaumont Feb. 18, 2016, pet. denied) (mem. op.) (citing *Christus Health Se. Tex. v. Licatino*, 352 S.W.3d 556, 563 (Tex. App.—Beaumont 2011, no pet.)); *Davis v. Motiva Enters., L.L.C.*, No. 09-14-00434-CV, 2015 Tex. App. LEXIS 3235, at **14-15 (Tex. App.—Beaumont Apr. 2, 2015, pet. denied) (mem. op.); *see also* Tex. R. App. P. 47.1.

Accordingly, we reverse and remand to the trial court for further proceedings consistent herewith.

REVERSED AND REMANDED.

LEANNE JOHNSON
Justice

Submitted on August 8, 2018
Opinion Delivered May 16, 2019

Before McKeithen, C.J., Kreger and Johnson, JJ.