APPENDIX—A

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COURT OF APPEALS
FOR THE
THIRD DISTRICT OF TEXAS

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Date: April 19, 2018

Appeal No.: 03-17-00054-CV
Trial Court No.: C-1-CV-16-003312

Style: Juan A. Martin-de-Nicolas v. AAA Texas County Mutual Insurance Company

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The enclosed opinion and judgment were sent this date to the following persons:

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TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

NO. 03-17-00054-CV

Juan A. Martin-de-Nicolas, Appellant

v.

AAA Texas County Mutual Insurance Company, Appellee

FROM COUNTY COURT AT LAW NO. 2 OF TRAVIS COUNTY
NO. C-1-CV-16-003312, HONORABLE JOE CARROLL, JUDGE PRESIDING

MEMORANDUM OPINION

Juan A. Martin-de-Nicolas sued his insurer AAA Texas County Mutual Insurance Company ("AAA") in justice court after AAA, despite his protestations, settled a claim pertaining to a car accident that Martin-de-Nicolas was involved in. AAA filed a motion for summary judgment arguing that the terms of the insurance policy issued to Martin-de-Nicolas authorized it to make the settlement, and the justice court granted the motion for summary judgment. Martin-de-Nicolas appealed to the county court at law, and AAA filed another motion for summary judgment arguing that the settlement was proper. The county court at law granted AAA's motion for summary judgment. In several issues on appeal, Martin-de-Nicolas contends that the county court at law erred by granting AAA's motion for summary judgment. We will affirm the order of the county court at law granting AAA's motion for summary judgment.

BACKGROUND

This appeal stems from a car accident involving Martin-de-Nicolas in which Martin-de-Nicolas's car hit a parked vehicle belonging to Rex Jones. After the accident, Martin-de-Nicolas's insurer, AAA, settled a claim made by Jones pertaining to the accident.

As a result of the car accident, Martin-de-Nicolas filed two separate lawsuits. The first lawsuit was against Jones and was filed in justice court. *See Martin-de-Nicolas v. Jones*, No. 03-13-00318-CV, 2014 WL 4414827 (Tex. App.—Austin Aug. 28, 2014, pet. dism'd w.o.j.) (mem. op.). In that suit, Martin-de-Nicolas argued that Jones parked his vehicle in a negligent manner by parking the car facing oncoming traffic and that Jones's actions violated relevant governing laws and caused the accident. *See* Tex. Transp. Code § 545.303(a) (providing that driver "who stops or parks on a two-way roadway shall do so with the right-hand wheels of the vehicle parallel to . . . the right-hand curb or edge of the roadway"). After a trial in justice court, the jury determined that Jones was not negligent, that Martin-de-Nicolas "was negligent and was one-hundred percent at fault for causing the crash," and that Martin-de-Nicolas "should recover zero damages." *See Jones*, 2014 WL 4414827, at *1. Martin-de-Nicolas then sought to appeal to the county court at law, but the county court at law dismissed the suit for lack of jurisdiction on the ground that Martin-de-Nicolas's appeal bond was not timely filed. *See* Tex. R. Civ. P. 506.1 (setting out procedure for appealing from judgment rendered by justice court). Martin-de-Nicolas then appealed to this Court, and this Court affirmed "the judgment dismissing appellant's appeal to the county court at law for want of jurisdiction." *See Jones*, 2014 WL 4414827, at *4.

The second suit was filed by Martin-de-Nicolas against AAA, was similarly filed in justice court, and was stayed pending final resolution of the first suit. In the second suit, Martin-

de-Nicolas alleged that he instructed AAA to refuse to pay any damage claim that Jones made because Jones parked his car in a negligent and illegal manner, that AAA "falsely attributed fault to" Martin-de-Nicolas "in order to preemptively vacate their duty to defend" him "in the event that . . . Jones filed a suit to recover damages," that AAA's actions were inconsistent with its "express warrant[y] made in their liability policy" stating that AAA will only pay for damages for which the policy holder is legally liable, and that AAA's actions constituted fraud and were violations of the Deceptive Trade Practices Act and of chapter 541 of the Insurance Code. In response, AAA filed a combined traditional and no-evidence motion for summary judgment contending that Martin-de-Nicolas "failed to state a claim on which he can recover" because "no recognized cause of action in common law fraud," in the Deceptive Trade Practices Act, or in "Chapter 541 applies to this set of facts" in which the express terms of the insurance policy allow AAA to settle claims, including the one at issue, that it deemed appropriate. Alternatively, AAA asserted that there was no evidence that AAA committed fraud, "violated the Texas Deceptive Trade Practices Act, or violated Chapter 541 of the Insurance Code" in this case. After reviewing the motion for summary judgment and the various responses, the justice court issued an order granting AAA's motion.

Following that ruling, Martin-de-Nicolas appealed to the county court at law. In response, AAA filed another combined traditional and no-evidence motion for summary judgment. When referring to Martin-de-Nicolas's petition filed in the justice court,[1] AAA repeated its assertion that the basis for Martin-de-Nicolas's suit is not supported by the language of the policy and also

[1] The record does not contain a petition that was filed in the county court at law, and Martin-de-Nicolas asserts in his appellate briefing that his petition "from JP Court carrie[d] forward to County Court."

repeated its contention that there was no evidence of fraud or any violation of the Deceptive Trade Practices Act or the Insurance Code. AAA attached to its motion for summary judgment a copy of the insurance policy purportedly issued to Martin-de-Nicolas by AAA for the time in question.

After reviewing the motion, Martin-de-Nicolas filed a response asserting that AAA failed to comply with various discovery requests, that the insurance-policy language relied on by AAA did not come from Martin-de-Nicolas's actual policy, that there is a genuine issue of material fact precluding summary judgment, and that AAA's no-evidence motion for summary judgment did not identify the essential elements for which there was no evidence, and Martin-de-Nicolas also included in his response an objection to having a visiting judge preside over the summary-judgment proceedings. As support for his claim that AAA was relying on the wrong policy when moving for summary judgment, Martin-de-Nicolas attached to his response to the motion for summary judgment certified documents from the Commissioner of Insurance consisting "of copies of the AAA . . . Personal Automobile Insurance Policy approved" for the year in question that Martin-de-Nicolas obtained after filing an open-records request. The language of the pertinent portion of the policy differs from the language of the policy that AAA attached in its motion.

After reviewing the motion and the response, the county court at law issued an order granting the motion for summary judgment without specifying whether it was granting the motion on no-evidence or traditional grounds.

Martin-de-Nicolas appeals the order by the county court at law.

STANDARD OF REVIEW AND GOVERNING LAW

"We review the granting of a motion for summary judgment de novo." *Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 248 (Tex. 2013). "When the trial court does not specify the grounds for its ruling, a summary judgment must be affirmed if any of the grounds on which judgment is sought are meritorious." *Id.* "When a party moves for summary judgment on both traditional and no-evidence grounds," reviewing courts "first address the no-evidence grounds . . . because if the non-movant fails to produce legally sufficient evidence to meet his burden as to the no-evidence motion, there is no need to analyze whether the movant satisfied its burden under the traditional motion." *Id.* (internal citation omitted).

"After adequate time for discovery, a party without presenting summary judgment evidence may move for summary judgment on the ground that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial," and "[t]he motion must state the elements as to which there is no evidence." Tex. R. Civ. P. 166a(i). "No-evidence summary judgments are reviewed under the same legal sufficiency standard as directed verdicts." *Merriman*, 407 S.W.3d at 248. "Under that standard, evidence is considered in the light most favorable to the nonmovant, crediting evidence a reasonable jury could credit and disregarding contrary evidence and inferences unless a reasonable jury could not." *Id.* The nonmovant has the burden of producing summary-judgment evidence "'raising a genuine issue of material fact'" for each challenged element. *Johnson v. Brewer & Pritchard, P.C.*, 73 S.W.3d 193, 206 (Tex. 2002) (quoting Tex. R. Civ. P. 166a(i)). A no-evidence challenge will be sustained when "'(a) there is a complete absence of evidence of a vital fact, (b) the court is barred by rules of law

or of evidence from giving weight to the only evidence offered to prove a vital fact, (c) the evidence offered to prove a vital fact is no more than a mere scintilla, or (d) the evidence conclusively establishes the opposite of the vital fact.'" *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex. 2003) (quoting *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)).

In a traditional summary-judgment motion, the movant has the burden of showing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. *See* Tex. R. Civ. P. 166a(c); *Browning v. Prostok*, 165 S.W.3d 336, 344 (Tex. 2005). We take as true evidence favorable to the nonmovant and resolve all doubts in its favor. *Little v. Texas Dep't of Criminal Justice*, 148 S.W.3d 374, 381 (Tex. 2004); *Harwell v. State Farm Mut. Auto. Ins. Co.*, 896 S.W.2d 170, 173 (Tex. 1995). The movant is entitled to summary judgment if the evidence disproves, as a matter of law, at least one element of each of the plaintiff's causes of action or conclusively establishes each element of an affirmative defense. *Friendswood Dev. Co. v. McDade & Co.*, 926 S.W.2d 280, 282 (Tex. 1996); *see Ryland Grp., Inc. v. Hood*, 924 S.W.2d 120, 121 (Tex. 1996).

Resolving the issues presented in this appeal requires an evaluation of the terms of the insurance policy that Martin-de-Nicolas had with AAA. "Insurance policies are contracts and therefore are controlled by rules of construction applicable to contracts generally." *Columbia Cas. Co. v. CP Nat'l, Inc.*, 175 S.W.3d 339, 343 (Tex. App.—Houston [1st Dist.] 2004, no pet.). "The construction of an unambiguous contract is a question of law for the court," which we review de novo. *Tawes v. Barnes*, 340 S.W.3d 419, 425 (Tex. 2011). "A contract is not ambiguous simply because the parties disagree over its meaning." *Dynegy Midstream Servs., Ltd. P'ship v. Apache Corp.*, 294 S.W.3d 164, 168 (Tex. 2009). Rather, a contract is ambiguous only when "its meaning

is uncertain and doubtful or is reasonably susceptible to more than one interpretation." *Heritage Res., Inc. v. NationsBank*, 939 S.W.2d 118, 121 (Tex. 1996). "If only one party's construction is reasonable, the policy is unambiguous and we will adopt that party's construction." *RSUI Indem. Co. v. The Lynd Co.*, 466 S.W.3d 113, 118 (Tex. 2015). "But if both constructions present reasonable interpretations of the policy's language, we must conclude that the policy is ambiguous." *Id.* In that circumstance, "we must resolve the uncertainty by adopting the construction that most favors the insured." *National Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991).

"When discerning the contracting parties' intent, courts must examine the entire agreement and give effect to each provision so that none is rendered meaningless." *Tawes*, 340 S.W.3d at 425. When performing this review, no single provision will be given controlling effect; instead, all of the provisions must be considered in light of the whole agreement. *Id.* "In construing a written contract, the primary concern of the court is to ascertain the true intentions of the parties as expressed in the instrument." *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 662 (Tex. 2005). Accordingly, we "give contract terms their plain and ordinary meaning unless the instrument indicates the parties intended a different meaning." *Apache Corp.*, 294 S.W.3d at 168. "When construing an insurance policy, we are mindful of other courts' interpretations of policy language that is identical or very similar to the policy language at issue." *RSUI Indem. Co.*, 466 S.W.3d at 118.

DISCUSSION

On appeal, Martin-de-Nicolas generally contends that the county court at law erred by granting AAA's "motion for traditional and no-evidence summary judgment." After listing this

general issue, Martin-de-Nicolas presents seven more specific subissues that he contends fall within this general issue. Regarding the extent to which the county court at law granted the no-evidence motion, Martin-de-Nicolas argues that the county court at law erred because "AAA's no-evidence motion for summary judgment is fatally flawed in that it failed to specifically state the essential element(s) of [his] theories of recovery as to which it alleged there is no evidence" and because AAA abused and delayed "the discovery process by frivolously objecting to all discovery requests and using the summary judgment procedure to circumvent discovery." Regarding the extent to which the county court at law granted the traditional summary-judgment motion, Martin-de-Nicolas asserts that if the county court at law construed the insurance policy in the manner suggested by AAA, the county court at law erred because Martin-de-Nicolas's construction of the policy "is the only one which does not do violence to the rules of law or rules of contract construction" regardless of whether the language of the policy is ambiguous or unambiguous. In addition, Martin-de-Nicolas argues that the county court at law's ruling was improperly based on evidence that AAA "fraudulently produced" when moving for summary judgment and on grounds relating to the Jones lawsuit that are separate and distinct from the issues present in this case. Next, Martin-de-Nicolas urges that the grounds upon which AAA sought summary judgment "required AAA to first file special exceptions" and required the county court at law "to sustain" the special exceptions before the complaints "could be raised via a motion for summary judgment." Finally, Martin-de-Nicolas insists that the county court at law's order must be reversed because he "timely objected to having the summary judgment proceeding presided [over] by a visiting judge" but that "a visiting judge presided over the summary judgment hearing and signed the summary judgment order" over his objections.

No-Evidence Motion for Summary Judgment

As set out above, in his fifth subissue, Martin-de-Nicolas contends that AAA's allegation in its no-evidence motion for summary judgment that "there is no evidence" that AAA "committed fraud" or "violated the Texas Deceptive Trade Practices Act" or "Chapter 541 of the Texas Insurance Code" did not sufficiently identify the elements of Martin-de-Nicolas's claims for which there was no evidence and, accordingly, argues that the county court at law erred by granting the no-evidence motion. *See* Tex. R. Civ. P. 166a(i). In his third subissue, Martin-de-Nicolas asserts that the county court at law erred by granting the no-evidence motion for summary judgment because the motion was granted before there had been an "adequate opportunity for discovery" as required by Rule of Civil Procedure 166a(i) and because AAA abused the discovery process by refusing to respond to discovery requests before moving for summary judgment on no-evidence grounds. *See id.*; *see also Tempay, Inc. v. TNT Concrete & Constr., Inc.*, 37 S.W.3d 517, 520-21 (Tex. App.—Austin 2001, pet. denied) (noting that "[w]hen a party contends that it has not had an adequate opportunity for discovery before a summary-judgment hearing, it must file either an affidavit explaining the need for further discovery or a verified motion for continuance" and that goal of judicial economy found in Rule 166a is balanced "with the safeguard that nonmovants be entitled to" adequate amount of time for discovery).

As will be set out below, we ultimately determine that the county court at law did not err by granting the motion on traditional summary-judgment grounds. Accordingly, we need not consider whether the no-evidence portion of AAA's motion for summary judgment could also support the judgment. *See* Tex. R. App. P. 47.1.

Traditional Motion for Summary Judgment

Different Versions of the Insurance Policy

In his first subissue on appeal, Martin-de-Nicolas insists that the policy that AAA attached to its summary-judgment motion did not contain the same terms as the policy issued to him and, therefore, had no applicability to this case. Further, Martin-de-Nicolas notes that after AAA moved for summary judgment, he filed a response and attached to his response a copy of the actual insurance policy from AAA in effect at the time of the accident that he obtained from the Department of Insurance and that was certified by the Commissioner of Insurance. Moreover, Martin-de-Nicolas urges that the county court at law improperly made its summary-judgment ruling based on the terms of the policy submitted by AAA.

The language of the policy attached by AAA to its motion for summary judgment provided, in relevant part, as follows: "We will pay damages for bodily injury or property damage for which any covered person becomes legally responsible because of an auto accident. . . . We will settle or defend, as we consider appropriate, any claim or suit asking for these damages." The language of the policy relied on by Martin-de-Nicolas provided, in relevant part, as follows:

> 1. We will pay damages for which any ***insured*** is legally liable because of ***bodily injury*** or ***property damage*** caused by an auto accident.
>
> . . . .
>
> 2. We will defend any suit claiming damages under Part I. We will defend suit even if the allegations are groundless, false[,] or fraudulent.
>
> . . . .
>
> 4. We may settle any claim or suit as we think appropriate.

On appeal, Martin-de-Nicolas notes the differences in the language used in the two policies offered during the summary-judgment proceedings and further argues that the policy offered by AAA had policy numbers within it corresponding both to his policy and to the policy of another individual. Further, Martin-de-Nicolas observes that the copy of the policy submitted to the justice court was certified by a different AAA employee than the copy of the policy submitted by AAA to the county court at law and notes that AAA failed to provide "any explanation for the need to correct or amend." Moreover, Martin-de-Nicolas urges that the policy that he presented is the true version of the policy that he purchased and contains the obligatory language framing his contention that AAA did not have the authority to settle the claim with Jones.

In light of the preceding, Martin-de-Nicolas contends that AAA's grounds for summary judgment were dependent on the language from the policy that it submitted as summary-judgment evidence and that AAA fabricated the policy in order to obtain summary judgment. Furthermore, Martin-de-Nicolas asserts that as a result of the language of the policy having been contradicted by the version certified by the Commissioner of Insurance, AAA failed to meet its burden of establishing that there were no genuine issues of material fact. In response, AAA indicates in its appellee's brief that there was a dispute as to which policy was in effect when the car accident occurred but contends that it was entitled to summary judgment regardless of which policy language applied.

As an initial matter, we note that the language of both policies was before the county court at law when it made its summary-judgment ruling. In addition, we note that although the structure of the language of the policies differed slightly, the language of the relevant portions of the two policies setting out AAA's obligations is nearly identically worded. Accordingly, although

there could conceivably have been some dispute regarding which of the two policies actually applied to the accident at issue, we cannot agree with Martin-de-Nicolas's assertion that the existence of the two policies meant that there was a genuine issue of material fact regarding whether AAA was authorized to settle the underlying claim because both policies seem to impose the same requirements and obligations on AAA. In other words, a determination regarding whether AAA was authorized to settle the claim would not seem to depend on which of the two policies was in effect at the time of the accident. However, in light of Martin-de-Nicolas's assertion that the certified version of the policy that he submitted was the true policy and did not authorize AAA's actions in this case, we will assume for the sake of argument that Martin-de-Nicolas presented the correct policy in his response and will refer to this version of the policy when addressing the remainder of Martin-de-Nicolas's subissues.

For these reasons, we overrule Martin-de-Nicolas's first subissue on appeal.

Construction of Policy Terms

In his second subissue, Martin-de-Nicolas argues that the county court at law erred by granting the traditional portion of the motion for summary judgment because the terms of the insurance policy did not authorize AAA to pay a claim made by Jones regarding the accident. When presenting this subissue, Martin-de-Nicolas acknowledges AAA's assertion that the terms of the policy authorized AAA to settle claims that it deemed appropriate and then contends that the policy must "be ambiguous because he interprets the policy as not conferring the right to 'chose to settle'" and must, therefore, be construed in his favor. Alternatively, Martin-de-Nicolas asserts that his

"policy interpretation is the only one which gives effect to all policy provisions and will not do violence to rules of law or policy construction."

When presenting his construction arguments on appeal, Martin-de-Nicolas points to the language stating that AAA will pay for damages for which an insured "is legally liable" and urges that "the only way to become legally responsible [or liable] for damages is if the determination is made by applying Texas law to the facts of an accident." Further, Martin-de-Nicolas contends that under the terms of the policy, AAA was required to investigate and determine, on its own, whether its policyholder was legally responsible for the damages. In addition, Martin-de-Nicolas argues that under the policy, AAA may only pay for damages after it determines that a policyholder is legally responsible for the damages and that AAA may "not pay for damages where the [policyholder] is not legally liable because those damages are not covered by the policy." When applying that construction to the present case, Martin-de-Nicolas insists that AAA should have determined for itself that he was not legally responsible because Jones was negligent per se for parking his car in the wrong direction and, therefore, should have refused to pay any damages claimed by Jones.[2]

Although Martin-de-Nicolas offers an interpretation of what he believes AAA's obligations are under the terms of the policy, AAA offers another construction of the relevant provisions of the contract. Specifically, AAA argues that the policy obligates AAA to pay for damages

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[2] In his brief, Martin-de-Nicolas refers to various provisions of the Transportation Code specifying that an insurance company "may settle a claim covered by the policy," *see* Tex. Transp. Code § 601.073(e), and that a "liability insurance policy must . . . pay . . . amounts the insured becomes obligated to pay as damages," *see id.* §§ 601.076, .077. Based on those provisions, Martin-de-Nicolas avers that "an insurance company may not settle claims that are not covered by the policy—namely those where the insured is not legally obligated to pay." However, we do not read these statutes as prohibiting the settlement of claims by an insurance company under the circumstances present here.

that its insured is "legally liable" for, meaning that AAA is obligated to pay damages after a legal decision by a court or other adjudicative body has determined that AAA's policyholder was responsible for causing the damages. Moreover, AAA asserts that in addition to obligating AAA to pay after a judicial determination has been made, the policy authorizes AAA to settle claims or suits without the need for a legal determination of responsibility to avoid the expense of litigation when it determines that settling is "appropriate."

When construing the policy at issue, we note as an initial matter that Martin-de-Nicolas's construction would *prohibit* AAA from paying on a claim after making its own assessment of the claim even if, as happened in the first suit filed by Martin-de-Nicolas, a trial court has determined that its policyholder caused the damages and was legally liable. That construction would run contrary to the statutory requirement imposed on insurers to pay damages that a policyholder has "become legally obligated to pay." *See* Tex. Transp. Code §§ 601.076, .077. Moreover, Martin-de-Nicolas's interpretation, unlike AAA's, does not give effect to all of the provisions of the policy and essentially renders the settlement clause meaningless. Further, AAA's construction is consistent with the plain meaning of the provisions requiring AAA to pay when an insured is legally liable for damages and empowering AAA with the discretion to settle suits or claims where "appropriate." *See Liable, Black's Law Dictionary* 998 (9th ed. 2009) (defining "liable" as meaning "[r]esponsible or answerable in law; legally obligated"). In addition, as set out below, AAA's interpretation is consistent with the construction given by appellate courts considering other types of insurance policies.

For example, in *Dear v. Scottsdale Insurance Company*, our sister court of appeals was faced with an issue regarding whether a provision in a professional-liability insurance policy

authorizing an insurer "to settle any claim or suit as it 'deems expedient'" authorized the insurer to settle claims within the liability limits without the approval of the insured. 947 S.W.2d 908, 911, 913-14 (Tex. App.—Dallas 1997, writ denied), *disapproved of on other grounds by Apex Towing Co. v. Tolin*, 41 S.W.3d 118, 122-23 (Tex. 2001) (disavowing portion of *Dear* decision potentially deciding that tolling rule should not apply to certain legal-malpractice cases). On appeal, our sister court determined that the language of the policy "unambiguously vest[ed] [the insurance company] with an absolute right to settle third-party claims in its own discretion and without [the policyholder]'s consent, even if the allegations of the suit are groundless, false, or fraudulent." *Id.* at 913-14. Further, the court explained that "[b]y purchasing an insurance policy that did not provide him the right to veto settlement of third-party claims, [the policyholder] gave up the right to complain that any settlement [the insurance company] entered somehow damaged him." *Id.* at 914. In addition, the court concluded that the insurer owed the insured "no duty of good faith and fair dealing" regarding its investigation of the claim and its decision to settle. *Id.* Finally, the court determined that the insurer "had an unambiguous contractual right to settle the claims asserted against [the policyholder] and that it cannot be liable under any theory for exercising that right." *Id.* at 915. Relying on *Dear*, that same court later construed the terms of an automobile-insurance policy authorizing the insurance company to "'investigate and settle any claim or suit as [the insurance company] consider[s] appropriate'" and concluded that the language "vested [the insurance company] with an absolute right to settle third party claims based on its own discretion" and did not require the policyholder's "consent for a settlement." *Stevens Transp., Inc. v. National Cont'l Ins. Co.*, No. 05-98-00244-CV, 2000 WL 567225, at *1, *3 (Tex. App.—Dallas May 11, 2000, no pet.) (not designated for publication).

A similar conclusion was reached by another one of our sister courts of appeals when it was asked to construe the terms of a worker's compensation policy. *See Wayne Duddlesten, Inc. v. Highland Ins. Co.*, 110 S.W.3d 85, 89-90 (Tex. App.—Houston [1st Dist.] 2003, pet. denied). In that case, the terms of the policy provided, in relevant part, that the insurance company "'will pay promptly when due the benefits required of you by the Worker's Compensation law'"; had "'the right and duty to defend at our expense any claim, proceeding[,] or suit against you for benefits payable by this insurance'"; and had "'the right to investigate and settle these claims[,] proceedings[,] or suits.'" *Id.* at 90. The policyholder argued that the insurer violated the terms of the policy by settling "claims that should not have been covered by the policy." *Id.* When resolving the issue on appeal, our sister court determined that if the insurance company exercised its right under the policy "to settle a claim, then payment will be required" under the remaining portions of the policy. *Id.* Further, the court noted that there was "no requirement in the policy that [the insurance company] obtain the consent of [the policyholder] when settling a claim or investigating the merits of a claim" and that the insurance company's "discretion in investigating and settling claims is not contractually limited." *Id.*

For all of these reasons, we conclude that the terms of the policy are not ambiguous and that the policy affords AAA the discretion to settle claims made against its insured, including the claim at issue, without the insured's consent and without the need for a judicial determination regarding whether its insured was legally liable for the damages. Accordingly, we overrule Martin-de-Nicolas's second subissue on appeal.[3]

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[3] As further support for his construction of the insurance policy, Martin-de-Nicolas asserts that if an insurance company "had the right to 'choose to settle' for whatever reason," then "an

Special Exceptions

In his fourth subissue on appeal, Martin-de-Nicolas contends that the county court at law should not have granted the traditional motion for summary judgment because AAA was required to but did not file special exceptions pointing out any defects in Martin-de-Nicolas's pleadings before seeking summary judgment. *See* Tex. R. Civ. P. 91 (stating that "[a] special exception shall not only point out the particular pleading excepted to, but it shall also point out intelligibly and with particularity the defect, omission, obscurity, duplicity, generality, or other insufficiency in the allegations in the pleading excepted to"); *see also Centennial Ins. Co. v. Commercial Union Ins. Cos.*, 803 S.W.2d 479, 482 (Tex. App.—Houston [14th Dist.] 1991, no writ) (noting "that the protective features of the special exception procedure should not be circumvented by a motion for summary judgment on the pleadings or other means where a plaintiff's pleadings fail to state a cause of action"). Stated differently, Martin-de-Nicolas contends that the basis of AAA's traditional motion for summary judgment was that he failed to state a claim upon which he could recover and further argues special exceptions must be filed before summary judgment can be granted on those grounds.

In its motion for summary judgment, AAA did not assert that it was entitled to summary judgment because there was a defect or other insufficiency in Martin-de-Nicolas's

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insurance company who insures both parties in a two-car accident could systematically 'choose to settle' with the party who has the lowest damages; thus systematically assuring [itself] the lowest payouts and the highest profits possible." As an initial matter, we note that the potential for this possibility would seem to exist in the circumstance in which both insureds only had liability coverage. More importantly, even if an insurer settled the claim for the lower payout, the dissatisfied driver could still sue the driver who settled and seek a legal determination that the settled driver was legally responsible for the damages and thereby seek recovery from the insurance company, which would be legally obligated to cover damages awarded by the trial court under the terms of the insurance policy.

pleadings; rather, it asserted that it was entitled to judgment as a matter of law because "no recognized cause of action" authorized recovery under the facts of this case. More specifically, AAA argued that Martin-de-Nicolas's claims are based on his interpretation of the insurance policy; that the express terms of the insurance policy authorized AAA to, "within its discretion, settle a claim made against the policy"; and that "an insurer paying a claim within its discretion, though the insured disagrees with the decision to pay, is not a violation of any law." In other words, AAA asserted that it was entitled to summary judgment, as a matter of law, because the terms of the policy authorized the disputed payment and "did not seek summary judgment on the basis that [Martin-de-Nicolas] failed to state a cause of action or any other pleading deficiency." *See Williams v. Adventure Holdings, L.L.C.*, No. 05-12-01610-CV, 2014 WL 1607374, at *2 (Tex. App.—Dallas Apr. 22, 2014, pet. denied) (mem. op.). Accordingly, we cannot conclude that the county court at law erred when it granted AAA's motion for summary judgment "because the motion was not attempting to circumvent the filing of special exceptions." *See id.*; *see also Friesenhahn v. Ryan*, 960 S.W.2d 656, 658 (Tex. 1998) (explaining that "[s]ummary judgment may . . . be proper if a pleading deficiency is of the type that could not be cured by an amendment"); *Champion Printing & Copying LLC v. Nichols*, No. 03-15-00704-CV, 2017 WL 3585213, at *16 (Tex. App.—Austin Aug. 18, 2017, pet. denied) (mem. op.) (determining that "special exceptions were not required and summary judgment was appropriate").

For these reasons, we overrule AAA's fourth subissue.

Separate Matters

In his sixth subissue, Martin-de-Nicolas argues that AAA improperly included details from his lawsuit against Jones in its motion for summary judgment and urges that "if summary judgment was granted on those extrinsic details, it was improperly granted." *See Stephens v. LNV Corp.*, 488 S.W.3d 366, 374 (Tex. App.—El Paso 2015, no pet.) (providing that "'[a] motion for summary judgment must itself expressly present the grounds upon which it is made, and must stand or fall on these grounds alone'" (quoting *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 912 (Tex. 1997))). More specifically, Martin-de-Nicolas contends that the details and the verdict pertaining to his lawsuit against Jones "are immaterial to the case at hand." Alternatively, Martin-de-Nicolas insists that if "it would have been proper to tie the fate of" the two cases together, AAA should have but failed to request that the cases be consolidated. *See* Tex. R. Civ. P. 174(a) (authorizing trial courts to consolidate cases "involving a common question of law or fact").

Although AAA mentioned some of the underlying facts and procedural aspects of the lawsuit against Jones in its summary-judgment motion, the grounds upon which it sought summary judgment were independent of the outcome or underlying facts of the lawsuit against Jones. Moreover, as previously discussed above, AAA urged that summary judgment was warranted in this case because the insurance policy provided AAA with the discretion to settle claims, and we previously determined that AAA's construction of the terms of the policy was reasonable and correct. Accordingly, we cannot conclude that the county court at law's summary-judgment ruling was improperly based on extrinsic facts, and we overrule Martin-de-Nicolas's sixth subissue on appeal.

Objection to Presiding Judge

In his final subissue on appeal, Martin-de-Nicolas contends that summary judgment was improperly granted in this case because before the county court at law made its ruling, he filed a written objection to the case being presided over by a visiting judge.

At the end of his response to AAA's motion for summary judgment, Martin-de-Nicolas included the following request and objection:

> Plaintiff hereby respectfully objects to this or any other motion being heard or decide[d] by a visiting judge. Plaintiff respectfully requests that it be the elected judge of the court [] who hears and rules on this and any future motion or trial.

On appeal, Martin-de-Nicolas contends that in light of his request, the presiding judge should have been removed from the case under section 74.053 of the Government Code. *See* Tex. Gov't Code § 74.053.

Section 74.053 does allow parties to object to a judge who has been assigned to preside over a trial and who is not the duly-elected or appointed judge for that trial court. *Id.* In particular, the provision states that "[i]f a party to a civil case files a timely objection to the assignment, the judge shall not hear the case." *Id.* § 74.053(b). "Unlike disqualification of a judge based on a constitutional prohibition, which can be raised at any point in a proceeding, a statutory basis for recusal of a judge can be waived." *Sweetwater Austin Props., L.L.C. v. SOS All., Inc.*, 299 S.W.3d 879, 890 (Tex. App.—Austin 2009, pet. denied). In other words, "[b]ecause the prohibition from hearing a case under section 74.053 is nonconstitutional, . . . the objection is waivable and must be presented *and ruled upon* to trigger any mandatory prohibition." *Texas Emp't Comm'n v. Alvarez*, 915 S.W.2d 161, 165 (Tex. App.—Corpus Christi 1996, no writ) (emphasis added).

Nothing in the record before this Court indicates that Martin-de-Nicolas made any attempt to present his objection or have it ruled upon by the presiding judge. Accordingly, we must conclude that the alleged error has not been preserved for appellate consideration and overrule Martin-de-Nicolas's final subissue on appeal. *See id.* at 166 (concluding that party waived written objection under section 74.053 "by proceeding to trial without first presenting its . . . objection and obtaining a ruling from the assigned judge"); *see also* Tex. R. App. P. 33.1(a) (setting out requirements for preserving "a complaint for appellate review"). *But see Lone Star Indus., Inc. v. Ater*, 845 S.W.2d 334, 336 (Tex. App.—El Paso 1992, no writ) (observing that "[s]ince the question of the qualification of a retired judge to serve on assignment is a jurisdictional question, it cannot be waived and can be raised at any time").[4]

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[4] When asserting that it was error for the visiting judge to render summary judgment after he filed his objection, Martin-de-Nicolas primarily relies on *NCF, Inc. v. Harless*, 846 S.W.2d 79 (Tex. App.—Dallas 1992, orig. proceeding). In that case, a party sought mandamus relief after seeking to remove under section 74.053 a judge who had been assigned to the case. *Id.* at 80. When discussing the applicable law, our sister court of appeals noted that "[o]nce a party makes a timely objection under section 74.053, disqualification of the assigned judge is automatic, and any subsequent orders that he issues are nullities." *Id.* at 81. Then, the court determined that the party was entitled to mandamus relief because the trial judge's disqualification was mandatory. *Id.* at 83.

We believe that Martin-de-Nicolas's reliance on *NCF* is misplaced. As an initial matter, we note that this case does not involve a situation in which the party sought to enforce its objection to the assigned judge by filing a petition for writ of mandamus. Further, to the extent that the language from the opinion by our sister court of appeals can be read as suggesting that the filing of an objection to an assigned judge under section 74.053, without more, results in automatic disqualification and renders any ruling rendered after the objection void, we believe that this language is inconsistent with the language of the subsequent opinion discussed above indicating that an objection under section 74.053 can be waived by inaction. *See Texas Emp't Comm'n v. Alvarez*, 915 S.W.2d 161, 165 (Tex. App.—Corpus Christi 1996, no writ). In any event, we are not bound by the analysis from our sister court.

For all the reasons previously given, we must conclude that the county court at law did not err by granting AAA's traditional motion for summary judgment.[5]

CONCLUSION

Having determined that the county court at law did not err by granting AAA's traditional motion for summary judgment, we affirm the order of the county court at law granting AAA's motion for summary judgment.

David Puryear, Justice

Before Justices Puryear, Pemberton, and Bourland

Affirmed

Filed: April 19, 2018

[5] In his reply brief, Martin-de-Nicolas presents fifteen separate objections to AAA's appellee's brief, ranging from attacks on AAA's statement of the case and list of the issues presented to attacks on the argument section of AAA's brief. In resolving the issues presented on appeal, it is not necessary to make any formal ruling regarding these challenges, but those challenges were considered when framing this opinion.

TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN

JUDGMENT RENDERED APRIL 19, 2018

NO. 03-17-00054-CV

Juan A. Martin-de-Nicolas, Appellant

v.

AAA Texas County Mutual Insurance Company, Appellee

APPEAL FROM COUNTY COURT AT LAW NO. 2 OF TRAVIS COUNTY
BEFORE JUSTICES PURYEAR, PEMBERTON, AND BOURLAND
AFFIRMED -- OPINION BY JUSTICE PURYEAR

This is an appeal from the judgment signed by the trial court on October 26, 2017. Having reviewed the record and the parties' arguments, the Court holds that there was no reversible error in the judgment. Therefore, the Court affirms the trial court's judgment. Appellant shall pay all costs relating to this appeal, both in this Court and the court below.

APPENDIX—B

FILE COPY

RE: Case No. 18-0713 DATE: 1/25/2019
COA #: 03-17-00054-CV TC#: C-1-CV-16-003312
STYLE: MARTIN-DE-NICOLAS v. AAA TEX. CNTY. MUTUAL INS. CO.

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MR. JUAN A. MARTIN-DE-NICOLAS
* DELIVERED VIA E-MAIL & POSTAL *

FILE COPY

RE: Case No. 18-0713 DATE: 1/25/2019
COA #: 03-17-00054-CV TC#: C-1-CV-16-003312
STYLE: MARTIN-DE-NICOLAS v. AAA TEX. CNTY. MUTUAL INS. CO.

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

MR. JEFFREY D. KYLE
CLERK, THIRD COURT OF APPEALS
209 WEST 14TH STREET, ROOM 101
AUSTIN, TX 78701
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 18-0713 DATE: 1/25/2019
COA #: 03-17-00054-CV TC#: C-1-CV-16-003312
STYLE: MARTIN-DE-NICOLAS v. AAA TEX. CNTY. MUTUAL INS. CO.

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

COUNTY CLERK TRAVIS COUNTY
TRAVIS COUNTY COURT
P. O. BOX 149325
AUSTIN, TX 78714
* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 18-0713 DATE: 1/25/2019
COA #: 03-17-00054-CV TC#: C-1-CV-16-003312
STYLE: MARTIN-DE-NICOLAS v. AAA TEX. CNTY. MUTUAL INS. CO.

Today the Supreme Court of Texas denied the petition for review in the above-referenced case.

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FILE COPY

RE: Case No. 18-0713 DATE: 5/3/2019
COA #: 03-17-00054-CV TC#: C-1-CV-16-003312
STYLE: MARTIN-DE-NICOLAS v. AAA TEX. CNTY. MUTUAL INS. CO.

Today the Supreme Court of Texas denied the motion for rehearing of the above-referenced petition for review.

MR. JUAN A. MARTIN-DE-NICOLAS

* DELIVERED VIA E-MAIL *

FILE COPY

RE: Case No. 18-0713 DATE: 5/3/2019
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