

IN THE SUPREME COURT OF TEXAS

No. 96-0994

RICHARD L. SHEPHERD, M.D., AND
ALLAN GRAHAM, M.D., PETITIONERS

v.

LAHOMA LEDFORD, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE SECOND DISTRICT OF TEXAS

- consolidated with -

No. 96-1243

TRANSAMERICAN NATURAL GAS CORPORATION,
SOUTHWEST TEXAS SERVICES, INC.,
L.T.V. ENERGY PRODUCTS D/B/A WILSON MANUFACTURING,
CONTINENTAL EMSCO COMPANY D/B/A WILSON MANUFACTURING,
WILSON-WICHITA, INC. D/B/A WILSON MANUFACTURING, AND
DANA CORPORATION D/B/A WILSON MANUFACTURING, PETITIONERS

v.

NANCY RODRIGUEZ FUENTES, RESPONDENT

ON APPLICATION FOR WRIT OF ERROR TO THE
COURT OF APPEALS FOR THE FOURTH DISTRICT OF TEXAS

Argued on April 23, 1997

JUSTICE HECHT, joined by CHIEF JUSTICE PHILLIPS and JUSTICE OWEN, concurring in part and dissenting in part.

I agree with the Court that Section 1.91(b) of the Family Code bars plaintiffs' recoveries in these two cases. I do not agree, however, that Dr. Shepherd and Dr. Graham's attorney waived applicability of that statute by stipulating that Lahoma and John Ledford had a valid common law

marriage. The purpose and effect of the stipulation was merely to obviate the necessity of proof of the marriage at trial; it was not intended to waive defendants' consistent contention that even if a marriage existed, Section 1.91(b) precluded Ledford from asserting it in this action. The Court's contrary conclusion is not supported by the text of the stipulation and is contrary to defendants' intent apparent in the context in which the stipulation was made. I would hold that the stipulation does not preclude the application of Section 1.91(b), and that judgment should be rendered for Drs. Shepherd and Graham, just as the Court renders judgment for TransAmerican Natural Gas Corporation and the other defendants in the companion case. From the affirmance of the judgment against Drs. Shepherd and Graham I respectfully dissent.

Ms. Ledford could not sue for John Ledford's death without proving that she had been his wife. *See* TEX. CIV. PRAC. & REM. CODE § 71.004. Ms. Ledford claimed a common-law marriage to John Ledford. Section 1.91(b) requires that a proceeding in which a common-law marriage is to be proved must be brought within one year of the relationship's end. Ms. Ledford did not initiate such a proceeding within the prescribed time period. Thus, as the Court holds, she cannot recover in this action unless defendants waived applicability of Section 1.91(b).

Before trial Dr. Shepherd and Dr. Graham asserted that Section 1.91(b) prevented Ms. Ledford from recovering for John Ledford's death because this action was undisputedly not brought within one year of the termination of their relationship. Defendants took this position in a motion for summary judgment, a supplemental motion for summary judgment, and a plea in abatement. The district court consistently rejected defendants' argument.

On the first day of trial, counsel for all parties approved a written stipulation "that Lahoma Ledford and John Ledford had a valid common-law marriage prior to and at the time of John Ledford's death." The stipulation was made in the form of an order signed by the district court and approved by counsel. At the close of plaintiff's evidence, defendants moved for a directed verdict on the ground that Section 1.91(b) precluded plaintiff from proving a common-law marriage. Without allowing plaintiff's counsel to respond, the district court denied the motion, stating: "I take

this as [defendants' counsel's] preserving her record for purposes of appeal. Since we've addressed this question . . . in motions for summary judgment and on other occasions, my ruling will be consistent." Thus, at this point in the trial, several days after the stipulation had been made, the district court, who signed the stipulation, was apparently of the view that defendants had not waived their Section 1.91(b) defense. Had the court thought that the stipulation waived the defense, there would have been no reason to refer to defendants' motion for directed verdict as being made to preserve their complaint for appeal. The district court's statement indicated that defendants had not by their stipulation waived their contention that Section 1.91(b) precluded plaintiff's recovery.

At the close of the evidence, Drs. Shepherd and Graham again moved for a directed verdict based on Section 1.91(b). Again the district court denied their motion without permitting plaintiff to respond. After a verdict against Drs. Shepherd and Graham, they moved for judgment non obstante veredicto, still asserting Section 1.91(b). For the first time, Ms. Ledford argued that defendants waived their contention by their pretrial stipulation. The court denied defendants' motion and rendered judgment against Drs. Shepherd and Graham for \$150,000, plus interest.

Unquestionably, Drs. Shepherd and Graham *could* have stipulated that Ms. Ledford would succeed in proving that she was married to John Ledford if only Section 1.91(b) permitted her to do so, without waiving their argument that Section 1.91(b) precluded her from making such proof. A defendant can stipulate that available evidence would prove a fact without waiving the contention that recovery based on the fact is barred for some other reason. To take another example, a defendant can stipulate that his negligence caused plaintiff's injuries without waiving his contention that plaintiff's claim is barred by limitations. The Court does not, and cannot, argue to the contrary. The question is not *could* defendants make such a limitlinquishment of a known right or intentional conduct inconsistent with claiming that right." *Sun Exploration & Prod. Co. v. Benton*, 728 S.W.2d 35, 37 (Tex. 1987). More than a century ago we said that waiver is "'largely a matter of intention'". *Pope v. A. T. Graham & Co.*, 44 Tex. 196, 199 (1875). More recently, we stated: "[W]aiver must be clearly established by facts or circumstances showing an intention by one party to waive and an

understanding to that effect by the other.” *Garner v. Texas State Bd. of Pharmacy*, 304 S.W.2d 530, 534 (Tex. Civ. App.—Eastland 1957, writ ref’d). Neither the intention by Drs. Shepherd and Graham to forego their Section 1.91(b) defense, nor the contemporaneous understanding by Ledford that they had done so, both requisite for waiver under our holding in *Garner*, is present.

I agree with the court of appeals in *United States Fire Insurance Co. v. Carter*, 468 S.W.2d 151, 154 (Tex. Civ. App.—Dallas), *writ ref’d n.r.e.*, 473 S.W.2d 2 (Tex. 1971) (per curiam), when it wrote:

A stipulation is an agreement or contract between the parties made in a judicial proceeding in respect to some matter incident thereto and for the purpose, ordinarily, of avoiding delay, trouble and expense. . . . Being a contract the stipulation must truly express the intentions of the parties making same. A court will not construe a stipulation so as to effect an admission of something intended to be controverted or so as to waive a right not plainly agreed to be relinquished.

Accord: Jackson v. Lewis, 554 S.W.2d 21, 24 (Tex. Civ. App.—Amarillo 1977, no writ) (stating also that a stipulation “will be given no more force than the parties intended it to have”); *see also Discovery Operating, Inc. v. Baskin*, 855 S.W.2d 884, 886 (Tex. App.—El Paso 1993, no writ); *Ortega-Carter v. American Int’l Adjustment Co.*, 834 S.W.2d 439, 441-442 (Tex. App.—Dallas 1992, writ denied); *National Union Fire Ins. Co. v. Martinez*, 800 S.W.2d 331, 334 (Tex. App.—El Paso 1990, no writ). I also agree with the court of appeals in *Mann v. Fender*, 587 S.W.2d 188, 202 (Tex. Civ. App.—Waco 1979, writ ref’d n.r.e.) (quoting *Texas Indem. Ins. Co. v. Dunn*, 221 S.W.2d 922, 924 (Tex. Civ. App.—Waco 1949, no writ), that “[t]he intention of the parties in a trial stipulation is for the determination of the court from the language used in the entire agreement ‘in the light of the surrounding circumstances, including the state of the pleadings, the allegations therein, and the attitude of the parties in respect of the issues.’”

The stipulation does not itself reflect an intention to waive applicability of Section 1.91(b), and there is no other evidence in our record from which that intention can be discerned. To the contrary, Drs. Shepherd and Graham have consistently maintained before trial, during trial, after trial, and on appeal, that Ms. Ledford’s recovery is barred by Section 1.91(b). Defendants explained that they agreed to the stipulation as a mechanism for shortening the trial of the case by obviating the

need for plaintiff to adduce evidence of her common-law marriage which defendants acknowledged existed but argued was to no avail because of the statute. The district court, who signed the stipulation, was apparently of the view mid-trial that defendants had not waived their position. Ms. Ledford did not assert that defendants had waived their Section 1.91(b) defense until she filed her response to defendants' motion for judgment non obstante veredicto. While it now appears that defendants' counsel would have been prudent to expressly reserve defendants' Section 1.91(b) contention in the stipulation, she was not required to do so. Waiver is the intentional relinquishment of a known right, not the unintentional failure to reserve a known right.

The Court offers no explanation for its holding that Drs. Shepherd and Graham intended to waive a defense they had consistently asserted prior to trial and continued to assert afterward. Absent a clear statement of waiver in the stipulation, any evidence of an intent to waive defenses in defendants' conduct, any evidence that plaintiff understood the stipulation to be a waiver at the time it was made, and any suggestion of a reason why defendants might have intended to waive a position they were continuing to assert, I would hold that Drs. Shepherd and Graham did not waive their defense under Section 1.91(b). The \$150,000 judgment against them is simply not their lawyer's fault. Because the Court says it is, I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: January 29, 1998