

IN THE SUPREME COURT OF TEXAS

No. 03-0662

REPUBLIC UNDERWRITERS INSURANCE CO., PETITIONER

v.

MEX-TEX, INC., RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

JUSTICE O'NEILL, joined by JUSTICE SMITH, dissenting.

I agree with the Court that some evidence supports the trial court's finding that Republic breached the policy by failing to pay the cost of the comparable roof Mex-Tex installed. I also agree with the Court's definition of a "claim" under Article 21.55 for purposes of assessing penalties, and that the statutory penalty assessed against Republic should be based on the full amount of the claim if its tender of partial payment to Mex-Tex was not unconditional. Here, my agreement ends. I simply cannot conclude, as the Court does, that no evidence supports the trial court's finding that Republic's partial payment was not unconditional. Accordingly, I respectfully dissent.

Article 21.55 subjects an insurer that fails to pay a claim within a prescribed period to a statutory penalty. TEX. INS. CODE art. 21.55, §§ 3(f), 6. The Court correctly concludes that the amount of the "claim" on which a penalty is calculated is not the amount that the insured demands, but the amount that the trial court finds the insurer actually owes under the policy. The Court also acknowledges that the statutory penalty may be assessed against Republic on the full amount of the

claim if its partial payment to Mex-Tex was not unconditional, but concludes there is no evidence to support the trial court's finding that Republic "tried to enforce a full and final release of [the claim] when only a partial payment had been made." I disagree.

There is evidence that it was both Republic's intent and Mex-Tex's understanding that the tender of \$145,460 within the statutory period was to settle the claim. That might not in itself be enough to establish as a matter of law that the payment was conditional, as there must also be evidence that the tender was "expressed by acts or declarations with sufficient clarity that [Mex-Tex was] bound to know that [its] acceptance of the tendered payment [would] constitute full payment of [its] claim." *H.L. "Brownie" Choate, Inc. v. Southland Drilling Co.*, 447 S.W.2d 676, 679 (Tex. 1969). But here, Republic's letter accompanying the second tender of the check stated, "we must respectfully deny your proof of loss since the amount is more than we have determined to be the covered loss." Moreover, Republic's letter acknowledging return of the check stated the check had been issued "in good faith as payment for your client's loss." If the Court declared a bright-line rule that for a tender of payment to be conditional the tenderor must contemporaneously offer a formal release, I might agree with its conclusion. However, the rule the Court recites is not so definitive, requiring merely that the evidence establish a clear "assent of the parties" and that "the minds must meet." ___ S.W.3d at ___ (citing *Jenkins v. Henry C. Beck Co.*, 449 S.W.2d 454, 455 (Tex. 1969)).

In *Jenkins*, the trial court granted summary judgment in favor of the defendant debtor on its defense of accord and satisfaction. 449 S.W.2d at 455. We reversed, holding that the debtor's communications to the creditor accompanying the tender did not constitute "unequivocal notice to [the creditor] that the checks were conditionally tendered in full and final satisfaction of [the debtor's] obligation to him at the time." *Id.* Because an accord and satisfaction was not conclusively established, we remanded the case to the trial court for further proceedings. *Id.* at 456;

see also George Linskie Co. v. Miller-Picking Corp., 463 S.W.2d 170, 173 (Tex. 1971) (reversing summary judgment on accord and satisfaction and remanding for trial because “defendant did not make known to plaintiff in clear and unmistakable terms that the tender was intended to be made upon the condition that its acceptance would constitute full satisfaction of all pending claims”).

In this case, had Republic moved for summary judgment based upon accord and satisfaction, I agree that it would have been unsuccessful. But that Mex-Tex did not conclusively prove Republic’s offer was conditional does not mean that the converse – the offer was unconditional – was established, as the Court in essence concludes. Rather, a fact issue was raised that the fact-finder resolved after a trial on the merits. Republic’s letters and other evidence regarding the parties’ intent support the trial court’s conclusion that the parties understood Republic’s check was being conditionally offered as full payment of Mex-Tex’s claim. I would defer to the trial court’s finding on this issue. Because I would affirm the court of appeals’ judgment in its entirety, I respectfully dissent.

Harriet O’Neill
Justice

OPINION DELIVERED: November 19, 2004