**Affirmed and Memorandum Opinion filed July 23, 2020.**


**In The**

# Fourteenth Court of Appeals

**NO. 14-19-00199-CV**

**TAMIKA C. HARRIS, Appellant**

**V.**

**ASSOCIATION OF WATER BOARD DIRECTORS–TEXAS, Appellee**

**On Appeal from the 129th Judicial District Court**
**Harris County, Texas**
**Trial Court Cause No. 2018-36026**

## MEMORANDUM OPINION

Appellant Tamika Harris seeks reversal of the trial court's final summary judgment that she take nothing on her claims and the denial of her amended cross-motion for summary judgment. Finding no error, we affirm the judgment of the trial court.

## I. BACKGROUND

In November 2017, Harris was elected as a director of Northwest Park Municipal Utility District ("MUD"). Recognizing that specialized knowledge is needed to carry out her duties as a director of a MUD, Harris sought to attend educational events of the Association of Water Board Directors–Texas ("Association" or "AWBD"). The Association is comprised of water related MUDs. Its purpose is to enhance water district operations and MUD management throughout Texas by providing education through publications, reports, newsletters, press releases, public discussions, forums, panels, lectures, seminars, and training programs.

When registration opened for the Association's June 2018 Annual Meeting and Summer Conference, Harris completed the registration form, but struck through the part of the Hold Harmless Agreement, which provides:

> **AWBD EVENT HOLD HARMLESS AGREEMENT**
>
> As part of the consideration for registration and for participating in the Association of Water Directors-Texas ("AWBD") Conference (the "Conference"), I warrant and represent that I am in the physical condition necessary to participate in the Conference. I further agree to indemnify and hold harmless AWBD and each of its trustees, officers, employees, committee members and volunteers with respect to any personal injury or death or any property loss or damage suffered or caused as a result of my participation in the Conference, specifically any injury, death or damage due to the negligence of AWBD, its trustees, officers, employees, committee members and volunteers.

The Association rejected Harris' registration because she refused to agree to this part of the Hold Harmless Agreement. On July 4, 2018, the Association sent Harris an email stating: "Ms. Harris—as you have been previously advised on several occasions, in order to register for any AWBD event, you must accept the hold harmless statement reflected on the registration form."

Harris sued the Association for breach of contract and injunctive relief, alleging that the Association could not require execution of the Hold Harmless Agreement for attendance at its meeting and events because such a requirement is not stated in the Association's Bylaws.

The Association filed a traditional and a no evidence motion for summary judgment. Harris filed a response and cross-motion for summary judgment. The trial court granted the Association's motion for summary judgment and ordered that Harris take nothing on her claims. The trial court denied Harris's cross-motion for summary judgment. Harris filed a notice of appeal.

## II. ANALYSIS

### A. STANDARD OF REVIEW FOR SUMMARY JUDGMENT

We review the granting of a summary judgment under a *de novo* standard of review. *See Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009). "[W]e apply the familiar standard of review appropriate for each type of summary judgment, taking as true all evidence favorable to the nonmovant, and indulging every reasonable inference and resolving any doubts in the nonmovant's favor." *Dias v. Goodman Mfg. Co., L.P.*, 214 S.W.3d 672, 675–76 (Tex. App.—Houston [14th Dist.] 2007, pet. denied).

To prevail on a traditional motion for summary judgment, a movant must establish that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); *Mann Frankfort*, 289 S.W.3d at 848. Once the movant facially establishes its right to summary judgment, the burden shifts to the nonmovant to present a material fact issue that precludes summary judgment. *See City of Houston v. Clear Creek Basin Auth.*, 589 S.W.2d 671, 678 (Tex. 1979); *Dolcefino v. Randolph*, 19 S.W.3d 906, 916 (Tex. App.—Houston [14th Dist.]

2000, pet. denied). Evidence raises a genuine issue of fact if reasonable and fair-minded jurors could differ in their conclusions in light of all of the summary judgment evidence. *See Goodyear Tire & Rubber Co. v. Mayes*, 236 S.W.3d 754, 755 (Tex. 2007) (per curiam).

A no-evidence motion for summary judgment is essentially a motion for a pretrial directed verdict and is governed by the standards of Texas Rule of Civil Procedure 166a(i). *Timpte Indus., Inc. v. Gish*, 286 S.W.3d 306, 310 (Tex. 2009). After an adequate time for discovery, a party without the burden of proof may, without presenting evidence, seek summary judgment on the ground that there is no evidence to support one or more essential elements of the nonmovant's claim or defense. TEX. R. CIV. P. 166a(i). After the movant specifically states the elements for which there is no evidence, the burden shifts to the nonmovant to produce more than a scintilla of probative evidence raising a genuine issue of material fact on those elements. *See id.*; *Mack Trucks, Inc. v. Tamez*, 206 S.W.3d 572, 582 (Tex. 2006). Unless the nonmovant produces summary-judgment evidence that raises a genuine issue of material fact, the trial court must grant summary judgment. TEX. R. CIV. P. 166a(i).

When both parties move for summary judgment and the trial court grants one motion and denies the other, the reviewing court should review both parties' summary judgment evidence and determine all questions presented. *Mann Frankfort*, 289 S.W.3d at 848. The reviewing court should render the judgment that the trial court should have rendered. *See Myrad Props., Inc. v. LaSalle Bank Nat'l Ass'n*, 300 S.W.3d 746, 753 (Tex. 2009); *Mann Frankfort*, 289 S.W.3d at 848.

When, as here, the trial court's order granting summary judgment does not specify the grounds relied on for the ruling, the summary judgment will be affirmed if any of the theories advanced are meritorious. *State Farm Fire & Cas. Co. v. S.S.*,

858 S.W.2d 374, 380 (Tex. 1993); *Olmstead v. Napoli*, 383 S.W.3d 650, 652 (Tex. App.—Houston [14th Dist.] 2012, no pet.).

### B. HARRIS'S CLAIM FOR BREACH OF THE ASSOCIATION'S BYLAWS

Harris argues that the Association's Bylaws are a contract between the Association and its members. "Texas courts have recognized that association bylaws may constitute a contract between the parties." *Monasco v. Gilmer Boating & Fishing Club*, 339 S.W.3d 828, 832 (Tex. App.—Texarkana 2011, no pet.).[1] Harris further argues that the Association could not deny her attendance at the Association's meetings and events because the Bylaws do not expressly state that execution of the Hold Harmless Agreement is a requirement for attendance.

We are not convinced that because the Bylaws are silent as to the Hold Harmless Agreement, the Bylaws preclude the Association from requiring attendees to execute a Hold Harmless Agreement to protect itself from liability. Our court (and others) have held that releases or hold harmless agreements of this kind are enforceable if they meet the "fair notice requirements" of (1) conspicuousness, and (2) the express negligence doctrine. *See e.g., Sydlik v. REEIII, Inc.*, 195 S.W.3d 329, 332 (Tex. App.—Houston [14th Dist.] 2006, no pet.); *Biscamp v. Special Pals, Inc*., No. 01-19-00005-CV, 2020 WL 716739, at *5 (Tex. App.—Houston [1st Dist.] Feb. 13, 2020, no pet.) (mem. op.) and decisions cited therein.

"Generally, in order to enforce a contract, a litigant must be either a party to that contract or an intended third-party beneficiary." *Heartland Holdings, Inc. v. U.S. Tr. Co. of Tex. N.A.*, 316 S.W.3d 1, 7 (Tex. App.—Houston [14th Dist.] 2010, no pet.).

[1] We do not decide whether the Bylaws constitute an enforceable contract between the Association and its members, but only for purposes of this appeal, we assume that they do. In its brief, the Association urges this court to apply decisions applying Texas contract law, so we will do so.

Thus, Harris may not enforce the Bylaws, absent proof that she is a member of the Association or is a third-party beneficiary of the Association Bylaws.

### 1. NO EVIDENCE THAT HARRIS IS A MEMBER OF THE ASSOCIATION

Harris has not shown she is a member of the Association. The Bylaws unambiguously define the Association's members as follows:

> MEMBERSHIP
>
> A. Members of the Association shall consist of the following:
>
> 1. Any District or other water or sewer control agency subject to the jurisdiction of the Texas Natural Resource Conservation Commission or any successor agency and the rules of the Texas Water Code, as may be amended from time to time, shall be eligible to apply for membership.
> 2. Any city, town or other political subdivision may also apply for membership under this Article.
> 3. Any attorney, professional engineer, certified public accountant, public accountant, financial advisor, contract operator, tax assessor-collector, or other professional or firm of such professionals actively representing one or more of the Districts and any supplier of materials or services designed for use by the Districts shall be eligible to apply for membership under this Article.

Harris presented no evidence that she falls within any of the three categories of membership. Harris admits in her brief that the Bylaws define members as MUDs, not MUD directors. Instead, as discussed below, she offered inadmissible extrinsic evidence to attempt to prove that directors of MUDS, such as herself, are considered members of the Association.

### 2. NO ERROR IN SUSTAINING OBJECTIONS TO EXHIBITS OFFERED BY HARRIS

In supporting or opposing a motion for summary judgment, a party can rely only on evidence that would be admissible at trial. *See* Tex. R. Civ. P. 166a(f); *see also United*

*Blood Servs. v. Longoria*, 938 S.W.2d 29, 30 (Tex. 1997). Thus, the trial court could properly sustain objections to any evidence that would not be admissible at trial.

Harris argues that the Bylaws are ambiguous as to who is a member and therefore extrinsic evidence of the parties' true intent is admissible to determine whether MUD directors, such as Harris, are members of the Association. Harris argues that the trial court erred in excluding certain exhibits proving the Association referenced and treated MUD directors as members in its publications and advertisements.

Assuming that Texas contract law applies, we disagree that the Bylaws are ambiguous as to the meaning of the term "member." Whether a contract is ambiguous is a question of law for the court to decide by looking at the contract as a whole in light of the circumstances at the time it was executed. *Anglo-Dutch Petroleum Int'l, Inc. v. Greenberg Peden, P.C.*, 352 S.W.3d 445, 450, 451 (Tex. 2011). "Contract ambiguity comes in two flavors: patent or latent." *Uri, Inc. v. Kleberg Cnty.*, 543 S.W.3d 755, 765 (Tex. 2018). A patent ambiguity is evident on the face of the contract while a latent ambiguity arises when a contract which is unambiguous on its face is applied to the subject matter with which it deals and an ambiguity appears by reason of some collateral matter, such as the circumstances present when the contract was entered. *Id*. When surrounding circumstances reveal an ambiguity about the intent embodied in the contract's language, extrinsic evidence of the parties' true intent will then—and only then—be admissible to settle the matter. *Id*. at 765–66. The parole evidence rule prohibits extrinsic evidence of subjective intent that alters a contract's terms but does not prohibit consideration of surrounding circumstances that inform, rather than vary from or contradict, the contract text. *Id*. at 767.

The Bylaws clearly define the categories of membership. Harris seeks to alter the Bylaws's clear definition of membership, to include MUD directors, through extrinsic evidence. However, the membership categories are clear and unambiguous.

Accordingly, Harris has not shown that the trial court erred by sustaining the Association's objections to the exhibits in question.

### 3. NO EVIDENCE THAT HARRIS IS A DONEE BENEFICIARY

Alternatively, Harris argues that she is a donee beneficiary of the Bylaws with the right to enforce them because the educational and training courses offered by the Association are intended to benefit directors of MUDs, such as herself. We disagree.

"Parties are presumed to contract only for their own benefit." *Esquivel v. Murray Guard, Inc.*, 992 S.W.2d 536, 543 (Tex. App.—Houston [14th Dist.] 1999, pet. denied). "A third party may sue and recover for breach of contract only if the contracting parties entered into the contract directly and primarily for his benefit." *Id*. "In determining the parties' intention, we must examine the contract in its entirety, and all of its provisions must be considered and construed together." *Id*. "Any doubts are resolved against a finding of the existence of a third-party beneficiary." *Id.* "There is a strong presumption against finding that a third party is a beneficiary of a contract." *Id.*

"Texas jurisprudence recognizes three types of third-party beneficiaries: donee, credit, and incidental." *Esquivel*, 992 S.W.2d at 543. "Only a donee or credit beneficiary may recover on a contract; an incidental beneficiary may not." *Id*. "The fact that a person might receive an incidental benefit from a contract to which he is not a party does not give that person a right of action to enforce the contract." *MCI Telecommunications Corp. v. Tex. Utilities Elec. Co.*, 995 S.W.2d 647, 651 (Tex. 1999).

Harris contends that she is a donee beneficiary of the Bylaws. "A person is a donee beneficiary if the performance of the contract inures to his benefit as a gift." *Esquivel*, 992 S.W.2d at 543. "An example is a prenuptial agreement in which a prospective bride promises to execute a will to benefit her prospective husband's children from a previous marriage." *Id*. "A donee beneficiary is not likely to be the intended

beneficiary of a business agreement." *Id.* "A person is a donee beneficiary only if a donative intent expressly or impliedly appears in the contract." *Id.*

Harris's argument is inconsistent with our decision in *Esquivel*, 992 S.W.2d at 539, where the contract at issue stated that Murray Guard shall furnish guards "for the purpose of securing persons and property of guests and employees of La Quinta [motel] . . .". Esquivel, who had her car stolen while she was a guest at the motel, argued that she was a third-party beneficiary with the right to sue Murray Guard for breach of this contract. *Id*. at 543. Our court concluded that because the contract between La Quinta and Murray Guard evidenced a business relationship, Esquivel did not qualify as a donee beneficiary. *Id*. at 544. Still, Esquivel contended that testimony of Patrick Devine, La Quinta's security director, established that she was an intended beneficiary. *Id*. Devine testified that La Quinta intended to provide security for the benefit of its guests. *Id*. We held that "Devine's testimony is irrelevant; we look only to the four corners of the agreement to determine the parties' intent." *Id*. "We glean intent from what the parties said in their contract, not what they allegedly meant." *Id*.

Harris's argument that she is a donee beneficiary with the right to compel the Association to allow her to attend Association meetings and educational events on her terms fails for two reasons. First, although the Bylaws state that the Association plans to advance the strength of Texas water district operation and management through education, there is no provision in the Bylaws that contractually obligates the Association to provide education or training to anyone. Not even a member, much less an alleged donee beneficiary, could recover from the Association if it failed to provide education or training.

Second, Harris has not shown that the Bylaws state or imply a donative intent or an intent to make a gift to Harris. The Bylaws' terms do not state any intent to make a gift to Harris or to directors of MUDs. The Bylaws are intended to govern the affairs of

the Association; they are not a personal agreement to make a gift. *See Esquivel*, 992 S.W.2d at 544. Standing alone, that Harris could have benefitted from attending meetings and educational events of the Association does not give her the right to enforce the Bylaws. *See MCI Telecommunications Corp*, 995 S.W.2d at 651. At most, Harris is an incidental beneficiary with no right of enforcement.

## III. CONCLUSION

The trial court did not err in granting summary judgment in favor of appellee because Harris did not present admissible evidence that she is a member of the Association or a donee beneficiary of the Bylaws; therefore, she may not sue for the Association's alleged breach of the Bylaws. Nor has Harris shown that the trial court erred by sustaining the Association's objections to Harris's exhibits, which were intended to show ambiguity concerning the Bylaws' definition of "member." We affirm the judgment of the trial court.[2]

/s/ Margaret 'Meg' Poissant
Justice

Panel consists of Justices Bourliot, Hassan, and Poissant.

[2] Because we conclude these grounds for summary judgment have merit, we need not address the other grounds presented in the Association's motion for summary judgment. *See Olmstead*, 383 S.W.3d at 652.