Affirmed and Majority and Dissenting Opinions filed June 14, 2001.

In The

Fourteenth Court of Appeals

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NO. 14-00-00605-CV

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JESUS BELLEZA-GONZALEZ, Appellant

V.

CONCEPCION VILLA AND MARIO P. VILLA, Appellees

On Appeal from the County Civil Court at Law No. 3
Harris County, Texas
Trial Court Cause No. 709,716

D I S S E N T I N G O P I N I O N

May a Texas State Farm adjuster agree to postpone service of process before suit is filed and then dishonor the agreement to appellant's detriment? Should "slavish adherence" to Rule 11, TEX. R. CIV. P. trump Rule 1 from the same book?

Rule 1 clearly articulates the purpose of the rules to obtain "a just, fair, equitable and impartial adjudication". TEX. R. CIV. P. 1. The nominal defendants ask us to look aside from a virtual fraud upon the court. It is undisputed, that a State Farm adjuster agreed to try to negotiate a settlement of the case in question prior to the necessity of service. It is undisputed because no one at State Farm denied the agreement. Through the nominal party, State Farm

seeks " a just, fair, equitable and impartial adjudication" they seek to dismiss Jesus Belleza-Gonzalez' claim without a trial. I find this most troubling, and therefore respectfully dissent.

My biggest criticism of the majority opinion is the failure to distinguish between enforceability of an agreement and summary judgment proof. Appellant does not seek to enforce the agreement. Rather, appellant offers the pre-suit agreement as evidence or proof of diligence. Surely, appellant counsel's affidavit is proper summary judgment proof, regardless of enforceability. And, the proof is uncontradicted.

A few scant years ago this court faced very similar facts. We held that an attorney's affidavit raised a material fact issue concerning the tolling of the statute of limitations. *Dixon v. Lee*, 912 S.W.2d. 857, 858 (Tex. App.—Houston [14th Dist.] 1995, no writ). The attorney averred "[Defendant's counsel] and I agreed to toll the statute of limitations while we pursued settlement." *Id.* We reversed the trial court's summary judgment because the proof raised a genuine issue of material fact. *Id*. Justice Anderson, joined by Justice Amidei and Chief Justice Murphy, went on to note that estoppel may bar a limitations defense when a party or his agent makes representations that induce a plaintiff to delay filing suit within the applicable limitations period. *Id*. at 859. Although the facts in Dixon did not support estoppel, stronger facts exist here where a party's agent materially misrepresents the abeyance of limitations, which was relied upon by plaintiff's counsel. Thereafter, the insurance company takes advantage of the misrepresentation by filing and obtaining summary judgment.

There is more than one reason to take exception to the slavish adherence to Rule 11. First, the agreement in question was consummated before there was "any suit pending." As the supreme court noted in *Kennedy v. Hyde*, 682 S.W.2d. 525, 529 (Tex. 1984), "an undisputed stipulation may be given effect despite literal noncompliance with the rule." (citations omitted). Second, an agreement in compliance with the rule is subject to attack because of fraud or mistake. *Id*. Third, a nonconforming agreement may be enforced for equitable reasons. *Id*. And fourth, Rule 11 is to be construed liberally to conform to modern trial practice. *Id.* (citing *City of Houston v. Clear Creek Basin Authority*, 589 S.W.2d. 671 (Tex.

1979). And finally, the majority opinion goes too far by not acknowledging the fundamental right of contract, exercised here by appellant, before suit, which cannot be abrogated by a procedural rule not applicable at the instant of contract formation.

Clearly, the appellant demonstrated both his uncontroverted proof of detailed diligence and "honoring an oral agreement." Today we forget both the trial court and the appellate court are courts of law *and chancery*. We "slavishly adhere" to a procedural rule in abrogation of the rule of justice, fairness and equity.[1] We place form over substance. We retroactively apply procedure to a substantive right of contract. And we turn a blind eye on an apparent fraud upon the court. I would reverse and remand.

/s/ Don Wittig
Justice

Judgment rendered and Opinion filed June 14, 2001.

Panel consists of Justices Yates, Wittig and Senior Chief Justice Murphy .

Publish — TEX. R. APP. P. 47.3(b).

[1] Like a ship's captain, the judge must not fix her gaze solely to the right, the rule. She is summoned to sometime glance to the left, to justice and equity. There, alone, is the sound middle course between slavish adherence to the rule and the shoals of fairness.