

CARTER V. ALLSTATE INSURANCE COMPANY

COURT OF APPEALS OF TEXAS, HOUSTON (1ST. DIST.), 1998
962 S.W.2D 268, REVIEW DENIED

FACTS Plaintiffs/appellants, Jesse Carter and Jesse Thomas, had an auto accident with Allstate's insured. Plaintiffs hired attorney Joseph Onwuteaka to represent them. On April 11, 1994, Mr. Onwuteaka sent a demand letter for settlement of plaintiffs' claims to Allstate's adjustor, Ms. Gracie Weatherly. Mr. Onwuteaka claims Ms. Weatherly made, and he orally accepted, settlement terms on behalf of the plaintiffs. When Allstate did not honor the agreements, plaintiffs filed this suit for breach of contract.

Allstate filed for summary judgment based on the statute of frauds. The trial court granted defendant's request for summary judgment without stating a particular basis. The plaintiffs/appellants appeal this judgment.

DECISION Judgment reversed and remanded.

OPINION Taft, J. [T]he appellants contend the alleged oral agreement is not governed by the Statute of Frauds. Allstate claims the Statute of Frauds is applicable to the alleged agreement as "a promise by another person to answer for the debt, default, or miscarriage of another person." [Citation.] This provision of the Statute of Frauds is commonly referred to as the "suretyship provision." [Citation.]

One test for determining whether a promise to pay the debt of another is within or without the Statute of Frauds

is whether the promisor is a surety, only secondarily liable, or has accepted primary responsibility for the debt. [Citations.] If the party is primarily liable, its promise to pay a debt is not required to be in writing by the Statute of Frauds [Citation.] However, if the party is a surety, the promise to pay the debt of a third party is required to be in writing. [Citation.]

If Allstate were merely a surety, its obligation would have been to pay its insured's debt upon default by its insured. However, as an insurer, Allstate contracted with its insured to assume responsibility for the liability of its insured, at least to the limits of the insurance policy. By Allstate's oral promise to settle, it was settling not only its insured's potential liability but its own possible obligation to pay and its own duty to defend its insured. The oral promise to settle was an original undertaking, not a promise to answer for the debt of the insured. Therefore, the suretyship provision of the Statute of Frauds does not apply to Allstate's promise to settle. [Citation.]

INTERPRETATION If the promisor makes an original promise to become primarily liable, then the statute of frauds does not apply.

CRITICAL THINKING QUESTION Should the contracts of a surety have to be in writing? Explain.