

**Motion for Rehearing Overruled, Opinion of June 1, 2000 Withdrawn, Reversed and Remanded Substituted Opinion filed July 20, 2000.**



**In The**

**Fourteenth Court of Appeals**

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**NO. 14-99-00244-CV**

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**CONTINENTAL CASUALTY CO., Appellant**

**V.**

**MAJOR CONSTRUCTORS, Appellee**

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**On Appeal from the 270<sup>th</sup> District Court  
Harris County, Texas  
Trial Court Cause No. 97-46964A**

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**SUBSTITUTED OPINION**

The opinion issued in this case on June 1, 2000 is withdrawn and the following opinion is issued in its place.

Appellant, Continental Casualty Co., appeals the trial court's grant of summary judgment in favor of appellee, Major Constructors, and the denial of its cross-summary judgment motion. On this appeal, we address whether Major's underlying declaratory judgment action presented a justiciable controversy regarding Continental's obligation to indemnify it under a CGL policy. We also determine whether the

court's summary judgment in favor of Major on that issue was proper. For reasons stated below, we reverse and remand. Appellant's motion for rehearing is denied.

### **Facts**

Major is a prime contractor on a NASA construction project. During the project, one of Major's subcontractors accidentally caused over \$235,000 in water damage to a building at the Johnson Space Center. Major requested Continental, its CGL carrier, to reimburse NASA for the damages. Continental refused, maintaining that pursuant to the CGL policy, it is only required to pay sums that Major becomes "legally obligated to pay as damages." No one claimed that Major was at fault for the damage. However, Major contends it was nonetheless "legally obligated to pay" NASA pursuant to its contract with NASA, therefore Continental was bound to indemnify it.

Major filed a declaratory judgment action requesting the court find that Continental had a duty to pay Major for the damages. Major and Continental filed motions for summary judgment on this issue. The trial court granted Major's motion and denied Continental's. On this appeal, Continental argues the trial court (1) did not have subject matter jurisdiction to rule on Major's declaratory judgment action; (2) erred in granting Major's summary judgment motion because Major did not prove it was "legally obligated to pay" NASA for the damages; and (3) erred in denying its cross-motion.

### **Subject Matter Jurisdiction**

Continental argues the court lacked jurisdiction to determine its duty to indemnify Major for the NASA claim because the claim was not justiciable. We have stated that the rule of justiciability pursuant to the Texas Uniform Declaratory Judgments Act<sup>1</sup> is that

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<sup>1</sup> The act states, in relevant part:

A person interested under a deed, will, written contract, or other writings constituting a contract or whose rights, status, or other legal relations are affected by a statute, municipal ordinance, contract, or franchise may have determined any question of construction or validity arising under the instrument, statute, ordinance, contract, or franchise and obtain a declaration of rights, status, or other legal relations thereunder.

(continued...)

if a declaratory judgment will terminate the uncertainty or controversy giving rise to the lawsuit, the trial court is duty-bound to declare the rights of the parties as to those matters upon which the parties join issue. In suits for declaratory relief, a trial court has limited discretion to refuse a declaratory judgment, and may do so only where judgment would not remove the uncertainty giving rise to the proceedings. A declaratory judgment is appropriate when a real controversy exists between the parties, and the entire controversy may be determined by judicial declaration.

*Spawglass Construction Corporation v. City of Houston*, 974 S.W.2d 876, 878-79 (Tex. App.–Houston [14<sup>th</sup> Dist.] 1998, pet. denied) (citations omitted).

Continental contends that where NASA has not even filed suit against Major, it is “pure speculation” to determine whether it has a duty to indemnify at this point. As such, the court’s resolution of the matter was an “impermissible advisory opinion” under the Declaratory Judgment Act.

Continental misstates the nature of the controversy. Major was not seeking a determination of what might happen *if* it were sued by NASA or what might happen later. Rather, Major asserted that under its contract with NASA it was, under the meaning of the policy, “legally obligated to pay” NASA as things stood at the time of filing the declaratory action. Therefore, Continental must now indemnify Major. Continental refused. Thus the controversy was very real and was ripe for a determination of whether Continental was obligated to provide insurance coverage to Major under those allegations or provide indemnity.<sup>2</sup> Accordingly, we hold Major raised a justiciable controversy in its declaratory action. Therefore, the trial court had jurisdiction to determine the controversy. We overrule this issue.

### **Summary Judgment**

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<sup>1</sup> (...continued)

A contract may be construed either before or after there has been a breach.

TEX. CIV. PRAC. & REM. CODE ANN. § 37.004 (Vernon 1997).

<sup>2</sup> Though we pointedly asked appellee to distinguish whether his complaint was about “coverage” or “indemnity” under the insurance policy, appellee failed to adequately make the distinction either before us or the trial court. Accordingly, for purposes of this issue neither do we draw the distinction (against our preference).

Next, Continental argues that the court erred in granting Major's motion for summary judgment and denying its motion for summary judgment. The only disputed issue is whether Major is "legally obligated to pay" NASA for the damages. Both parties agree that if Major is legally obligated to pay NASA, it is only via its contractual obligations with NASA. However, the contract that forms the basis for Major's obligations to NASA is not in the summary judgment record. Moreover, the record does not contain any quoted language from the contract or any stipulations pertaining to the contract.<sup>3</sup>

A court can affirm a summary judgment only if the record establishes that the movant has conclusively proved, as a matter of law, all the essential elements of its cause of action. *See Lear Siegler, Inc. v. Perez*, 819 S.W.2d 470, 471 (Tex. 1991). For Major to have proven as a matter of law that it was "legally obligated to pay" NASA because of its contractual obligations to NASA, we must, of course, know what the contract says. However, since the contract is not part of the record, we are unable to move beyond that threshold issue. Because of this, Major has failed to carry its summary judgment burden of establishing its claim against Continental as a matter of law. *Id.*; *Lloyd v. Holland*, 659 S.W.2d 103, 104-05 (Tex. App.–Houston [14th Dist.] 1983, no writ) (summary judgment must stand on the merits of its own supporting evidence). Further, because we do not have before us a record from which can ascertain the contractual rights and duties between Major and NASA, we are unable to conclusively determine appellant's duties as Major's carrier. Therefore, we hold that the trial court did not err in failing to grant summary judgment for Continental. We therefore sustain in part and deny in part Continental's second point of error.<sup>4</sup> The judgment of the trial court is reversed and remanded. Continental's motion for rehearing is denied.

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<sup>3</sup> We would happily cure this seemingly technical defect if we could. However this seminal document was not before the former trial judge either when he granted the summary judgment.

<sup>4</sup> For the first time on appeal, appellee also asserts that it is "legally obligated to pay" NASA because of a letter it received requesting payment from a NASA official. Because this ground was not presented in the trial court, it is waived on this appeal. *See Hall v. Harris County Water Control & Improvement Dist. No. 50*, 683 S.W.2d 863, 867 (Tex. App.–Houston [14th Dist.] 1984, no writ) (summary judgment cannot be affirmed on any grounds not presented in the motion for summary judgment).

/s/ Don Wittig  
Justice

Judgment rendered and Opinion filed July 20, 2000.

Panel consists of Chief Justice Murphy and Justices Hudson and Wittig.

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