CAUSE NO. D-1-GV-10-000454

STATE OF TEXAS,	§	**IN THE DISTRICT COURT OF**
	§	
Plaintiff,	§	
	§	
v.	§	**TRAVIS COUNTY, TEXAS**
	§	
RETIREMENT VALUE, LLC, *ET AL.*	§	
	§	
Defendants,	§	**126TH JUDICIAL DISTRICT**

WENDY ROGERS' BRIEF IN SUPPORT OF HER FIRST AMENDED MOTION TO ENFORCE SETTLEMENT AGREEMENT, DISGORGEMENT OF SETTLEMENT FUNDS AND REQUEST FOR EVIDENTIARY HEARING (THE "MOTION")

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES WENDY ROGERS ("Rogers"), and as requested by the Court, files this, her brief in support of her Motion, and shows as follows:

1. Rogers incorporates herein her Motion and all exhibits thereto.
2. The Court has expressed some concern that it may not have jurisdiction over the Motion and the specific request for relief sought by Rogers.
3. Before addressing the Court's concerns, Rogers will point out the relief which she is NOT seeking. To wit: Rogers is not asking this Court to take any action, or make any ruling regarding the indictments themselves, as that action can only be taken by the Collin County District Court in which those indictments are pending.
4. By this Motion, Rogers is simply trying to address a settlement agreement entered into in this Court, approved by this Court, and over which this Court specifically retained jurisdiction.

(See **Exhibit A** to the Motion.)

5. Further, "*the Texas Supreme Court has specifically instructed that "[w]here [a] settlement dispute arises while the trial court has jurisdiction over the underlying action, a claim to enforce the settlement agreement should, if possible, be asserted in that court under the original cause number." Mantas v. Fifth Court of Appeals, 925 S.W.2d 656, 658 (Tex.1996); see also Batjet, Inc. v. Jackson, 161 S.W.3d 242, 245 (Tex.App.-Texarkana 2005, no pet.) (noting that the parties properly asserted their motion for summary judgment to enforce the settlement agreement in the trial court under the original cause number); Citgo Ref. & Mktg. v. Garza, 94 S.W.3d 322, 330 (Tex.App.-Corpus Christi 2002, no pet.) (noting that because settlement dispute arose while trial court still had jurisdiction, parties properly asserted claims to enforce settlement agreement under original cause number). Enforcement of a settlement agreement as a separate cause of action is only necessary where the trial court no longer has jurisdiction over the underlying action. See Mantas, 925 S.W.2d at 658–59."* *See Fleming v. Ahumada*, 193 S.W.3d 704, 710 (Tex. App.—Corpus Christi 2006, no pet.)
6. Therefore, respectfully, this Court's jurisdiction is clear and it should recognize and accept it and act on this Motion.
7. Although Rogers was denied the opportunity to conduct discovery prior to being ordered to file this brief, she has pieced together some disturbing, yet revealing facts. In short, those facts demonstrate or tend to support the proposition that the settlement agreement was obtained by fraud. (Rogers has scheduled depositions for May 11 and 12, 2015, and will supplement this brief with additional facts once the depositions are concluded and the

transcripts obtained.)

8. Specifically, it appears that the only complaining party that appeared in front of the grand jury that indicted Rogers, was an employee of the Texas State Securities Board ("TSSB"), and the only prosecutors presenting the case to that grand jury, were all staff attorneys from the TSSB. It further appears that not a single participant/investor in Retirement Value, LLC, filed a complaint with the Collin County District Attorney's office.

9. It therefore appears that the same party that agreed, in writing, in the settlement agreement, not to pursue any further findings that Rogers committed securities fraud or sold a security, orchestrated indictments which by necessity require a determination inconsistent with that promise.

10. The case of *Kalyanaram v. Univ. of Texas Sys.*, 03-05-00642-CV, 2009 WL 1423920, (Tex. App.—Austin May 20, 2009, no pet.) is most instructive to an analysis of this situation. Although in that case the court of appeals upheld summary judgment in favor of the university and found against a claim that a settlement agreement was procured by fraud, its analysis is most useful here, because everything that was proven not to be true in that case, is in fact true here. (a copy of the opinion is attached hereto for the court's convenience.) In that case, the Third Court upheld summary judgment dismissing the claim that the settlement agreement was procured by fraud, because it found that the claimant failed to produce even a scintilla of evidence that suggested that the university breached a promise not to refer the matter for prosecution to the Collin County District Attorney, nor that it had any influence or authority in bringing the charges. The criminal referral had been already made at the time the

settlement agreement was entered into and the university had in fact written a letter urging that no charges be brought and that no indictment be handed down. As will become evident below, the facts in this case are dramatically different.

11. In paragraph 17 of the settlement agreement, the Attorney General, on behalf of the TSSB, agreed as follows:

"Release by the State. ***The State does hereby forever agree to RELEASE, ACQUIT, FOREVER DISCHARGE AND HOLD HARMLESS Wendy Rogers*** *and her attorneys, insurers, representatives, successors and assigns, and all person or entities in privity therewith,* ***from any and all civil claims, demands damages, actions, causes of action, and suits at law or in equity, of any kinds or nature, whether arising under statute or common law, whether known or unknown, that have been brought, should have been brought, or could have been brought in the Pending Case. The State does not release or waive its right to demand additional enforcement of the laws and regulations of the State of Texas or the United States, except with regard to those claims and causes of action, whether statutory, legal or equitable, which were, or should have been, or could have been, asserted in the Pending Case, regarding Retirement Value*** *or Hill Country Funding,* ***and which occurred prior to this Settlement.*** *This release does not affect the claims of any other party. Nor does this release include the Emergency Cease and Desist Order entered by the Texas Securities Commissioner on March 29, 2010. By this release, the State does not intend to release any other person including without limitation Wells Fargo Bank, N.A., Wells Fargo Advisors, LLC, Wells Fargo Investments, LLC, Whitney Giles, Ronald James,*

Donald James, James Settlement Services, LLC, Mike Beste, or any licensee of Retirement Value." (emphasis added) See **Exhibit A** to the Motion.

12. That promise was broken when a TSSB employee, as a complaining witness in front of the Collin County grand jury, at the urging of another TSSB employee, acting as a purported special prosecutor, convinced that grand jury that Rogers violated the securities laws of this state and committed securities fraud, contrary to the promise in the settlement agreement that they would never do so again.

13. Contrary to the situation in the *Kalyanaram* case, supra, where the court found that any promise by the university not to prosecute could not have been effective because the university did not have the authority to prosecute, and only the Collin County District Attorney had that authority, in this his case, the Attorney General, pursuant to the provisions of Article 581-3 of the Securities Act (the "Act"), does enjoy the rights, privileges and powers conferred by law upon district attorneys.

14. At no time during the proceedings in the receivership case, did the TSSB employees that were also acting as special prosecutors for Collin County, ever reveal to Rogers, her attorney, or the Court, that they were acting in dual roles. As a matter of fact, when introduced to the Court and the other parties in the case, they were always identified only as TSSB employees.

15. Further, although the TSSB Commissioner is obligated by the provisions of Article 581-3 of the Act to "*at once lay before the District or County Attorney of the proper county any evidence which shall come to his knowledge of criminality under the Act*", he did not do so

until five years after he first requested the Attorney General to sue Rogers for violating the securities laws and committing securities fraud, and almost three years after he agreed to enter into the settlement agreement with Rogers.

16. The trickery, intentional failure to disclose, and intentional broken promises that did not exist in the *Kalyanaram* case, supra, exist here, and form the basis for Rogers' requests for relief.

17. The Court should, without delay, recognize its jurisdiction, order the offending parties to a hearing, and after affording them the due process which they did not care to afford to Rogers, find that the settlement agreement was induced by fraud, should be set aside, her settlement money returned to her, and for such other relief to which she may show herself justly entitled.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document has been served on all counsel of record herein by:

☒ Electronic Service

on this the **30th day of April, 2015**.

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2009 WL 1423920
Only the Westlaw citation is currently available.

SEE TX R RAP RULE 47.2 FOR DESIGNATION AND SIGNING OF OPINIONS.

MEMORANDUM OPINION
Court of Appeals of Texas,
Austin.

Gurumurthy KALYANARAM, Appellant
v.
The UNIVERSITY OF TEXAS SYSTEM, The University of Texas at Dallas, Dr. Franklyn G. Jenifer, Dr. Hobson Wildenthal, Dr. Hasan Pirkul, and Robert Lovitt, Appellees.

No. 03-05-00642-CV. | May 20, 2009.

West KeySummary

1 **Compromise and Settlement**
Fraud or Duress

89Compromise and Settlement
89IIn General
89k7Validity
89k8Reality of Assent
89k8(3)Fraud or Duress

A former university employee failed to show that the university fraudulently induced him to sign a settlement agreement arising from his termination. The former employee's allegation that the university orally represented it would abandon its criminal charges if the parties settled did not constitute evidence of fraud. The settlement agreement expressly stated that it constituted the entire agreement between the parties and could not be varied by oral representation. Further, the former employee knew that the university forwarded its allegations to the district attorney two years before he signed the settlement agreement. Abandonment of the charges against him was therefore in the sole discretion of the district attorney, not the university, and the former employee could not plausibly claim to have relied on any representation to the contrary.

Cases that cite this headnote

From the District Court of Travis County, 261ST Judicial District, No. GN402205, Honorable Scott H. Jenkins, Judge Presiding.

Attorneys and Law Firms

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William T. Deane, Asst. Atty. Gen., Austin, TX, for Appellee.

Before Chief Justice JONES, Justices PATTERSON and PEMBERTON.

MEMORANDUM OPINION

J. WOODFIN JONES, Chief Justice.

*1 Appellant, Gurumurthy Kalyanaram, filed a petition for bill of review seeking to set aside a final judgment rendered pursuant to a settlement agreement that he reached with appellees, the University of Texas System, the University of Texas at Dallas ("UTD"), Franklyn Jenifer, Hobson Wildenthal, Hasan Pirkul, and Robert Lovitt (collectively, "the University").[1] Claiming that the University procured the settlement agreement through fraud and duress, Kalyanaram sought to reopen the lawsuit underlying it.[2] The University filed a "no-evidence" motion for summary judgment, which the district court granted. This appeal followed. We will affirm the district court's judgment.

1 Appellee Lovitt was not a signatory to the settlement agreement, but as a University of

Texas System employee he was bound by it.

[2] The lawsuit Kalyanaram sought to reopen in Travis County was one of several that Kalyanaram filed against University-related defendants. Kalyanaram has attempted to reopen or pursue other related suits as well. *See Kalyanaram v. University of Tex. Sys.*, 230 S.W.3d 921 (Tex.App.-Dallas 2007, pet. denied); *Kalyanaram v. Burck*, 225 S.W.3d 291 (Tex.App.-El Paso 2006, no pet.).

FACTUAL AND PROCEDURAL BACKGROUND

Previous Civil and Criminal Proceedings

Kalyanaram was a professor at UTD from 1988 to 2000. In 1998, UTD officers accused Kalyanaram of certain crimes and offered him the choice of either resigning or having the accusations referred to the Collin County District Attorney. Kalyanaram refused to resign, and UTD referred the accusations. Kalyanaram filed several civil suits against the University related to these events, including one in Travis County District Court. In 2000, Kalyanaram and the University resolved five of these suits, including the Travis County suit, in a Settlement Agreement and Mutual General Release. Accordingly, the District Court rendered a final judgment and order of dismissal with prejudice in the suit filed in Travis County.

As Kalyanaram's civil suits continued, parallel criminal proceedings began. The Collin County District Attorney obtained an indictment of Kalyanaram in 2000 and another in 2002. Kalyanaram stood trial and was acquitted of all charges in 2002.

Present Lawsuit

In 2004, Kalyanaram filed a petition for bill of review seeking to reopen his Travis County civil suit against the University. He alleged that the University violated the parties' 2000 settlement agreement by continuing to pursue criminal charges against him and by failing to notify him of its ongoing contact with the district attorney. Kalyanaram alleged that the University had procured the settlement agreement through fraud and duress.

The University filed a "no-evidence" motion for summary judgment, asserting both that it had sovereign immunity from Kalyanaram's claims and that Kalyanaram presented no evidence to satisfy the prerequisites of a fraud- or duress-based bill of review. *See* Tex.R. Civ. P. 166a(i). In response, Kalyanaram filed evidence consisting of, among other things, affidavits, deposition and trial transcripts, correspondence, and discovery responses. Regarding immunity, he argued that pursuant to *Texas A & M University-Kingsville v. Lawson*, 87 S.W.3d 513 (Tex.2002), the University was not immune from suits pertaining to the settlement agreement because it was not immune from suits for the "Whistleblower Act-type" claims underlying the settlement agreement. *See* Tex. Gov't Code Ann. § 554.0035 (West 2004).

*2 Without stating specific grounds, the trial court signed an order granting the University's no-evidence summary judgment motion and dismissing Kaylanaram's bill of review "without prejudice." This appeal followed.

STANDARD OF REVIEW

A party seeking a no-evidence summary judgment asserts that there is no evidence of one or more essential elements of a claim on which the opposing party will have the burden of proof at trial. Tex.R. Civ. P. 166a(i); *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 751 (Tex.2003). If the nonmovant produces more than a scintilla of probative evidence raising a genuine issue of material fact as to each challenged element on which he has the burden of proof, summary judgment is improper. *Id.* More than a scintilla of probative evidence exists when reasonable, fair-minded people could differ in their conclusions. *Chapman*, 118 S.W.3d at 751. Less than a scintilla of evidence exists when the evidence creates no more than mere surmise or suspicion. *Id.* In reviewing a grant of summary judgment, we take as true all evidence favorable to the nonmovant, making every reasonable inference and resolving all doubts in the nonmovant's favor. *Id.*

A summary judgment cannot be affirmed on grounds other than those specified in the motion. Tex.R. Civ. P. 166a(c). If a motion asserts multiple grounds and the trial court's order does not specify the grounds on which the summary judgment was granted, we must affirm if any of the grounds specified in the motion have merit. *See Provident Life & Accident Ins. Co. v. Knott,* 128 S.W.3d 211, 216 (Tex.2003).

DISCUSSION

Bill of Review

"A bill of review is an independent, equitable action to set aside a judgment that is no longer appealable or subject to a motion for new trial." *Miller v. Ludeman,* 150 S.W.3d 592, 595 (Tex.App.-Austin 2004, no pet.). Because of the critical importance of finality in judgments, bills of review " 'are always watched by courts of equity with extreme jealousy, and the grounds on which interference will be allowed are narrow and restricted.' " *Alexander v. Hagedorn,* 148 Tex. 565, 226 S.W.2d 996, 998 (Tex.1950) (quoting *Harding v. W.L. Pearson & Co.,* 48 S.W.2d 964, 965-66 (Tex. Comm'n App.1932, holding approved)). A party seeking a bill of review must allege and prove that (1) he had a meritorious defense to the cause of action alleged to support the judgment, (2) which he was prevented from making because of fraud, accident, or wrongful act of the opposite party, (3) that was untainted by any fault or negligence of his own. *See Chapman,* 118 S.W.3d at 752; *Hagedorn,* 226 S.W.2d at 998. A petitioner must satisfy all three requirements before he can obtain a bill of review. *See id.*

Sovereign Immunity

"Sovereign immunity" refers to the State's immunity from suit and liability. *Wichita Falls State Hosp. v. Taylor,* 106 S.W.3d 692, 694 n. 3 (Tex.2003). Sovereign immunity protects the State and all divisions of its government, including universities. *Id.* Immunity from suit bars an action against the State unless the State expressly consents. *Texas Dep't of Transp. v. Jones,* 8 S.W.3d 636, 638 (Tex.1999) (per curiam). A party suing a governmental entity must establish the State's consent through a statute or express legislative permission. *Id.* Trial courts lack subject matter jurisdiction over suits to which the State has not consented. *Id.* Plaintiffs bear the burden of establishing the trial court's jurisdiction. *Texas Ass'n of Bus. v. Texas Air Control Bd.,* 852 S.W.2d 440, 446 (Tex.1993).

***3** Here, Kalyanaram bore the burden of showing that the University had waived immunity from suit. The University properly put Kalyanaram to his proof by raising its sovereign immunity defense in a motion for summary judgment. *See Bland Indep. Sch. Dist. v. Blue,* 34 S.W.3d 547, 554 (Tex.2000). In reviewing the sovereign immunity defense and the evidence that Kalyanaram proffered to overcome it, we, like the trial court, may review the pleadings and any other relevant evidence. *Id.* at 554-55.

In a related case, the Dallas Court of Appeals addressed the precise sovereign immunity issues presented here. *See Kalyanaram v. University of Tex. Sys.,* 230 S.W.3d 921, 926-28 (Tex.App.-Dallas 2007, pet. denied) ("*Kalyanaram I*"). There, as here, Kalyanaram argued that *Lawson* precludes the University from claiming sovereign immunity in suits arising from settlement agreements. *See id.* at 926.[3] In *Lawson,* a faculty member sued Texas A & M University at Kingsville, a State employer, for, among other things, violations of the Whistleblower Act, Texas Government Code sections 554.001 et seq. *See Lawson,* 87 S.W.3d at 518-19. The parties settled and released the claim, and Lawson later sued for breach of the settlement agreement. *Id.* at 519. The university filed a plea to the jurisdiction based on sovereign immunity. *Id.* The supreme court held that the university could not claim immunity from suit for breaching the settlement agreement. *Id.* at 518. It stated: "[H]aving waived immunity from suit in the Whistleblower Act, the State may not now claim immunity from a suit brought to enforce a settlement agreement reached to dispose of a claim brought under that Act." *Id.* at 522-23. The logic of this holding is self-evident: if the government could settle a claim "with an agreement on which it cannot be sued[, that] would limit settlement agreements with the government to those fully performed before dismissal of the lawsuit because any executory provision could not thereafter be enforced." *Id.* at 521.

[3] *Kalyanaram I* initially included a petition for bill of review, but that claim was later dropped.

See 230 S.W.3d at 923-24.

In *Kalyanaram I*, the court of appeals held that *Lawson* dictated a conclusion that the University did not have sovereign immunity from Kalyanaram's breach-of-contract claim.

Kalyanaram I, 230 S.W.3d at 927. It stated: "[W]e conclude that Kalyanaram met his burden under the no-evidence standards of rule 166a(i) to produce summary judgment evidence raising a genuine issue of material fact whether his claim for breach of the Settlement Agreement comes within *Lawson*, thus waiving immunity from suit on this claim." *Id.* at 927-28. While Kalyanaram here proceeds by petition for bill of review, without a breach-of-contract claim, his petition still challenges the settlement agreement with the University. Accordingly, we conclude that Kalyanaram's petition for bill of review comes within *Lawson*. *See id.* Thus, sovereign immunity was not a proper basis for summary judgment or dismissal.

Fraud

***4** Kalyanaram argues that his fraud allegations constitute more than a scintilla of evidence that he satisfied the first two requirements of a petition for bill of review. *See Chapman*, 118 S.W.3d at 752 (party seeking fraud-based bill of review must demonstrate (1) he had a meritorious defense to the cause of action alleged to support the judgment, (2) which he was prevented from making because of fraud). Regarding fraud-based bills of review, the supreme court has said:

> Fraud in relation to attacks on final judgments is either extrinsic or intrinsic. Only extrinsic fraud will support a bill of review. Extrinsic fraud is fraud that denied a party the opportunity to fully litigate at trial all the rights or defenses that could have been asserted. Intrinsic fraud, by contrast, relates to the merits of the issues that were presented and presumably were or should have been settled in the former action.

Id. (citations omitted). Under this definition, if the University fraudulently induced Kalyanaram to settle his lawsuits, it committed extrinsic fraud and Kalyanaram has a "meritorious defense" entitling him to dissolve the settlement agreement. *Id.*; *see also Formosa Plastics Corp. USA v. Presidio Eng'rs & Contractors, Inc.*, 960 S.W.2d 41, 46 (Tex.1998) (party not bound by contract procured by fraud); *E.P. Towne Ctr. Partners, L.P. v. Chopsticks, Inc.*, 242 S.W.3d 117, 122 (Tex.App.-El Paso 2007, no pet.) (settlement agreements subject to same rules as other contracts). For the following reasons, however, we conclude that the Kalyanaram did not produce more than a scintilla of evidence that the University fraudulently induced him to sign the settlement agreement.

Fraudulent inducement has six elements: "(1) a material misrepresentation, (2) which was false, and (3) which was either known to be false when made or was asserted without knowledge of the truth, (4) which was intended to be acted upon, (5) which was relied upon, and (6) which caused injury." *Carr v. Christie*, 970 S.W.2d 620, 624 (Tex.App.-Austin 1998, pet. denied) (citing *DeSantis v. Wackenhut Corp.*, 793 S.W.2d 670, 688 (Tex.1990)). Kalyanaram argues that these elements were satisfied through the University's misrepresentations that it would: (1) "abandon" the criminal charges against Kalyanaram; (2) "cooperate" with Kalyanaram's criminal defense; and (3) adhere to the terms of the settlement agreement.

Kalyanaram alleges that the University orally represented it would "abandon" its criminal charges if the parties settled. This allegation does not constitute evidence of fraud for two reasons. First, the settlement agreement expressly states that it "constitutes the entire agreement between the parties [and] shall not be varied by ... oral representation." It also states that the parties "have each read this Agreement, and have consulted with their counsel concerning it, or have had the opportunity during a period of at least 21 days to consult with their counsel and consider the Agreement, and understand that this is a full and final release of all possible claims." Thus, Kalyanaram cannot argue that he relied on oral representations made before the agreement. *See Sun Oil Co. v. Madeley*, 626 S.W.2d 726, 731-32

(Tex.1981) (court will not entertain evidence of extrinsic agreements when contract is clearly integrated). Second, Kalyanaram knew that the University forwarded its allegations to the Collin County District Attorney two years before he signed the settlement agreement. "Abandonment" of the charges against him was therefore in the sole discretion of the District Attorney, not the University, and Kalyanaram cannot plausibly claim to have relied on any representation to the contrary.[4]

[4] In fact, the record indicates that the University did try to "abandon" Kalyanaram's criminal prosecution to the extent it could. Even before the parties settled, appellee Jenifer, the president of UTD, sent a letter on UTD letterhead to the Collin County grand jury stating that "[i]n both my personal capacity and in my representative capacity for U.T. Dallas, which is part of the U.T. System, it is my desire that Dr. Kalyanaram not be indicted or prosecuted in connection with the referred transactions."

*5 For the same two reasons, Kalyanaram cannot plausibly claim to have relied on any oral representations that the University would "cooperate" in his defense. Kalyanaram points to the University's trial and grand jury testimony as evidence that the University did not honor its agreement to cooperate. But even if the University did make a binding oral promise to "cooperate," its agents and employees were (as Kalyanaram admits) legally obligated to testify when subpoenaed. Thus, testifying could not evidence a failure to "cooperate." Kalyanaram counters that appellee Lovitt gave "conflicting" pre- and post-settlement testimony about the propriety of Kalyanaram's actions, which, according to Kalyanaram, suggests fraud. On the contrary, we have reviewed the testimony in question and do not find the purported conflicts.

Finally, Kalyanaram argues that the University's failure to adhere to the settlement agreement shows that its promise to do so was fraudulent. While a promise to adhere to the terms of a settlement agreement can be fraudulent if it is made with no intention to perform, "the mere failure to perform a contract is not evidence of fraud." *Formosa Plastics*, 960 S.W.2d at 48; *see also* Tex. Civ. Prac. & Rem.Code Ann. § 154.071(a) (West 2005) (settlement agreements enforceable in same manner as other contracts). Rather, to show that the University committed fraud, Kalyanaram must present evidence that the University "made representations with the intent to deceive and with no intention of performing as represented. Moreover, the evidence presented must be relevant to [the University's] intent at the time the representation was made." *Formosa Plastics*, 960 S.W.2d at 48 (citing, inter alia, *Spoljaric v. Percival Tours, Inc.*, 708 S.W.2d 432, 434 (Tex.1986)).

None of the University's alleged breaches of the settlement agreement indicate that the University had fraudulent intentions at the time of signing. Kalyanaram first alleges that the University breached the settlement agreement by giving grand jury and trial testimony. He appears to argue that the testimony violated a provision of the settlement agreement preventing University employees from "making defamatory statements which could disparage or otherwise cast aspersions on" Kalyanaram. Construing any of the University's testimony as "defamatory," however, would violate the absolute privilege that attaches to testimony given in connection with judicial proceedings. *See Jones v. Brown*, 637 S.W.2d 914, 916-17 (Tex.1982) (testimony given in connection with judicial proceedings cannot be "defamatory"). There is simply no provision of the settlement agreement that the University could have violated by its agents and employees giving grand jury and trial testimony when subpoenaed to do so.

Kalyanaram next alleges that the University violated the settlement agreement by failing to inform him of its ongoing contact with the district attorney's office. Section 4(a)(8) of the settlement agreement states: "UT Dallas will do nothing to interfere with Dr. GK's application for United States citizenship and will notify Dr. GK as soon as practical if contacted by the Immigration and Naturalization Service or other governmental authorities and will reasonably cooperate with Dr. GK as to such inquiries to the extent permitted by law." Given that this provision concerns Kalyanaram's citizenship application, it is not clear that the phrase "other governmental authorities" encompasses the district attorney's office or that the phrase "such inquiries" encompasses Kalyanaram's criminal prosecution. But even if section 4(a)(8) does encompass criminal prosecution by the district attorney's office, none of the University's contact with the district attorney's office suggests that the University

committed fraud when it promised to uphold the settlement agreement. The record indicates that all contact between the University and the district attorney's office pertained either to subpoenas for testimony or to events arising from Kalyanaram's criminal trial in 2002. As already discussed, the former is no indication of fraud.[5] The latter, the record indicates, occurred when Kalyanaram accused a University witness of committing perjury and the University contacted the district attorney's office to discuss a response. Such contact does not suggest that the University had fraudulent intentions when it signed the settlement agreement. In sum, we hold that Kalyanaram failed to present more than a scintilla of evidence that the University fraudulently induced him to sign the settlement agreement.

5 Kalyanaram claims that Lovitt testified to violating the terms of the settlement agreement. At most, however, Lovitt testified that he did not realize the settlement agreement bound him. This does not raise an inference that the University intended to violate the agreement, especially given that Lovitt did not in fact violate the agreement.

Duress

*6 Kalyanaram also argues that his duress allegations and proof constitute more than a scintilla of evidence that he satisfied the first two requirements of a petition for bill of review. *See Chapman*, 118 S.W.3d at 752 (party seeking bill of review must demonstrate (1) meritorious defense to cause of action alleged to support judgment, (2) which he was prevented from making because of wrongful act of opposing party). In other words, Kalyanaram argues that duress is both (1) a "meritorious defense" entitling him to dissolve the settlement agreement and (2) a wrongful action that prevented him from resisting the University's pressure to settle.

The El Paso Court of Appeals addressed this precise argument in a related case, *Kalyanaram v. Burck*, 225 S.W.3d 291, 301-02 (Tex.App.-El Paso 2006, no pet.). It stated:

> To establish a claim for duress, Appellant must show the following elements: (1) a threat or action was taken without legal justification; (2) the threat or action was of such a character as to destroy the other party's free agency; (3) the threat or action overcame the opposing party's free will and caused it to do that which it would not otherwise have done and was not legally bound to do; (4) the restraint was imminent; and (5) the opposing party had no present means of protection.

Id. at 301 (citing *McMahan v. Greenwood*, 108 S.W.3d 467, 492 (Tex.App.-Houston [14th Dist.] 2003, pet. denied)). Here, as in *Burck*, Kalyanaram argues that the University placed him under duress by threatening to pursue criminal prosecution and deportation. As the *Burck* court noted, however, such threats cannot support a claim for duress:

> [O]nce UTD forwarded [Kalyanaram's] information to the District Attorney, the threat of prosecution no longer emanated from UTD, but rather from the District Attorney's Office. Duress or undue influence can suffice to set aside a contract, but it is well-settled that it must originate from one who is a party to the contract. Courts will not invalidate contracts on grounds of duress when the alleged duress derives from a third person who has no involvement with the opposite party to the contract.

Id. at 302 (citations omitted).

As in *Burck*, the evidence in the present record shows that Kalyanaram knew that the University forwarded his information to the Collin County District Attorney two years before the settlement agreement was executed; thus, forwarding the information was no longer a threat. Furthermore, criminal prosecution and deportation could only be carried out by the Collin County District Attorney

and the Immigration and Naturalization Service; the University itself could not prosecute or deport him. Because the University could not itself carry out any of the threats that allegedly caused duress, Kalyanaram did not present more than a scintilla of evidence to satisfy a duress-based petition for bill of review. *See id.* (only duress coming from other contracting party can suffice to set aside contract).

Reformation of the Judgment

*7 Finally, we note that the trial court's summary judgment order erroneously dismissed Kalyanaram's suit "without prejudice." To the extent that "dismissal" language is appropriate in an order granting summary judgment at all, summary judgment necessarily entails dismissal *with* prejudice. *See Harris County v. Sykes,* 136 S.W.3d 635, 642 (Tex.2004) (Brister, J., concurring) (citing *Hyundai Motor Co. v. Alvarado,* 892 S.W.2d 853, 854 (Tex.1995) (per curiam)); *see also Morris v. Blangger,* 423 S.W.2d 133, 134 (Tex.Civ.App.-Austin 1968, writ ref'd n.r.e.) (dismissal resulting from summary judgment should have been with prejudice). Thus, even though neither party raised the issue on appeal, we reform the judgment by changing the phrase "without prejudice" to "with prejudice." *See Asbury v. State,* 813 S.W.2d 526, 529-30 (Tex.App.-Dallas 1991, pet. ref'd) ("The authority of an appellate court to reform incorrect judgments is not dependent upon the request of any party, nor does it turn on the question of whether a party has or has not objected in the trial court. The appellate court may act sua sponte and may have the duty to do so.") (citations omitted); *see also Morris,* 423 S.W.2d at 134 (reforming summary judgment from "without prejudice" to "with prejudice" because court has duty to terminate litigation where nothing in record indicates that appellant could successfully plead cause of action). The order granting summary judgment contains a second error: it states that the trial judge signed it on June 24, 2004, when it is undeniable from the record that he signed it on June 24, 2005. To avoid possible confusion in the future, we also reform the judgment by changing the signature date from June 24, 2004 to June 24, 2005.

CONCLUSION

While Kalyanaram presented more than a scintilla of evidence that the University waived sovereign immunity, he failed to present more than a scintilla of evidence that the University induced him to sign the settlement agreement through fraud or duress. We reform the trial court's judgment to reflect a dismissal "with prejudice" and to reflect a signature date of "June 24, 2005." We affirm the judgment as reformed.

Concurring Opinion by Justice PATTERSON.

CONCURRING OPINION

JAN P. PATTERSON, Justice.

I concur in the judgment only.

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