
Liability Insurance/ Intentional Acts

Texas Supreme Court Refuses to Apply Intentional Injury Exclusion to Injuries Resulting from High Speed Chase

Fact That Insured Hit His Brakes Moments before Impact Showed He Did Not Intend Injury

Tanner v. Nationwide Mutual Fire Insurance Company, ___ S.W.3d ___, 2009 WL 1028048 (Tex., April 17, 2009).

Case at a Glance

Under Texas law, an automobile policy's intentional injury that the exclusion applies only if "the insured intended to inflict damage or injury. To forfeit coverage, the insured must intend to harm, not merely intend to act." Thus, the exclusion did not apply to injuries resulting from a high speed chase in which the insured sped away from police at speeds approaching 100 miles per hour. This is so even though the express language of the exclusion precluded coverage for "willful acts the result of which the insured knows or ought to know will follow from the insured's conduct."

Summary of Decision

After being pulled over by a state trooper, the insured, Richard Gibbons, sped away in his Ford F-350 heavy duty pickup truck, with the trooper and several local police cars in hot pursuit. Gibbons drove through residential neighborhoods in San Marcos, Texas at 80 mph and the into the country going 100 mph. At a country intersection, Gibbons saw the Tanner's car. Although he slammed on his brakes, his car struck the Tanner's car, injuring all four occupants, one seriously. Gibbons fled the accident scene, doubling back and eventually driving into yet another field. Determined to end the chase, an officer shot out two of the truck's tires. Officers forcibly removed Gibbons from his truck and placed him under arrest.

The Tanners sued and won a default judgment

against Gibbons. Gibbons' insurer, Nationwide Mutual Fire Insurance Company, refused to pay damages and filed this declaratory judgment action, arguing the intentional injury exclusion barred coverage for the Tanners' claims. The jury disagreed, finding that Gibbons did not intentionally cause the Tanners' injuries. The trial court granted Nationwide's motion for judgment notwithstanding the verdict, and the court of appeals affirmed based on the language of the exclusion, which precluded coverage for property damage or bodily injury that is either [1] "caused intentionally by or at the direction of an insured," or the result of [2] "willful acts the result of which the insured knows or ought to know will follow from the insured's conduct."

The Texas Supreme Court granted review and entered judgment on the jury's verdict. Initially, the court noted that a jury verdict is reviewed under "the no-evidence standard." This means that the appellate court will credit evidence supporting a jury verdict if there was evidence such that reasonable jurors could decide as they did, and the court will disregard contrary evidence. Thus, the Tanners need only show there was more than a "scintilla" of evidence supporting its decision; Nationwide must show that the evidence conclusively proved that Gibbons intentionally injured the Tanners and that no reasonable jury could find otherwise.

[1]"Bodily Injury Caused Intentionally." Obviously, said the court, this language focuses on the effect of action and not the action (or conduct) itself:

[W]e emphasize this critical point: "intentionally" as used in the exclusion speaks to the resulting damage or injury, not to the actions that led to it. That is, the language is effect-focused and not cause-focused, voiding coverage when the resulting *injury* was intentional, not merely when the insured's *conduct* was intentional. [Emphasis in original]

Focusing on the recklessness of conduct, the court observed, would render coverage illusory for many of the risks for which insureds purchase auto insurance. The court noted that Texas mandates liability coverage for drivers, "but if ordinary Texans are unprotected from those who intentionally speed or run red lights, but intend no harm to others by doing

so, then Texas is replete with noncoverage notwithstanding its mandatory-coverage requirement.”

The court cited its decision in *State Farm Fire & Cas. Co., v. S.S.*, 858 S.W.2d 374 (Tex. 1993), to illustrate the proper application of the intentional harm requirement. There, the court held that person who knows he carries a sexually transmitted disease does not intentionally cause the transmission of the disease, unless he is substantially certain that he will cause contraction of the disease. In *S.S.*, the court refused to find a substantial certainty of harm as a matter of law because the insured *hoped* he would not transmit the disease. Here, the insured affirmatively *tried* to avoid injury by slamming on his brakes. Furthermore, Gibbons' hitting people was not the inevitable end of the high-speed chase. Indeed, he might have rolled over and injured only himself.

[2] “*Know or Ought to Know.*” This passage reinforced the idea that the insured must “intend the injurious *result*,” so that he insured must “intend to inflict damage or injury.” The “ought to know” language was the only puzzle. On one hand, the “ought to know” language suggests a new objective test for judging the insured’s conduct and its effects. The situation much be such that “a reasonable person would know that injury would follow from the conduct.” However, more significant, in the court’s view, was the requirement that the insured have knowledge that injury “will follow” from the conduct. This does not mean “might follow” or “is likely to follow” or “will probably follow.” It connotes inevitability and means *definitely will follow*.

The Court’s Conclusion. Of course, an exclusion with a different, broader wording would not necessarily lead to the same conclusion. That significant fact about different language has nothing to do with how this policy, with this wording, should be interpreted. The fact that an Ohio Court of Appeals has ruled the other way on an Ohio originated policy, as was this one, is not significant. *Nationwide Ins. Co. v. Finkley*, 679 N.E.2d 1189 (Ohio, App. 1996). (Interestingly, the Court of Appeals was influenced by exactly this case.)

Dissent. Justice Brister, a highly able, respected, and intelligent judge disagreed with the other eight (8) justices. He argued that this is a paradigm of an extreme case in which the insured ought to have known that something like what did happen would

happen, given what he was doing. Given how the police shot out Gibbons’ tires, they certainly knew what would happen if he kept up his outrageous driving. Even the Tanners’ trial counsel knew this, given how he did his closing argument.

Comment

A wide-spread Texas joke amongst insurance lawyers is now this. “Nationwide will now be with you, whether it likes it or not, even when you are trying to get away.”

What remains to be seen is how the court will rule when if an insurer comes out with an exclusion similar to, but broader than, Nationwide’s in that its excludes “willful acts the result of which the insured knows or ought to know *would likely* follow (or “*could* follow”). Given the court’s focus on how such language would render automobile insurance illusory in some circumstances, the Texas high court may very well refuse to enforce such language as a matter of public policy.// Quinn

Liability Insurance/ Pollution Exclusion

Pollution Exclusion Applied to Dispersal of Carbon Dioxide from Furnace into Apartment

Emission Fell within Exclusion’s Definition of “Discharge,” “Disperse,” “Seep,” and “Release”

Nautilus Insurance Company v. Country Oaks Apartments Ltd., ___ F.3d ___, 2009 WL 1067587 (5th Cir. April 22, 2009)

Case at a Glance

A pollution exclusion for release of irritants excluded coverage for dispersal of carbon monoxide into apartment after workers accidentally blocked furnace vent, and liability insurer owed no duty to defend personal injury case arising from dispersal.

The normal emission of carbon monoxide from an apartment furnace fell within the plain meaning of the terms “discharge,” “disperse,” “seep,” and