

IN THE SUPREME COURT OF TEXAS

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No. 07-0760
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GREG TANNER AND MARIBEL TANNER, INDIVIDUALLY AND AS NEXT FRIENDS OF
K.T. AND R.T., MINOR CHILDREN, PETITIONERS,

v.

NATIONWIDE MUTUAL FIRE INSURANCE COMPANY, RESPONDENT

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ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS
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Argued October 14, 2008

JUSTICE WILLETT delivered the opinion of the Court, in which CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE O'NEILL, JUSTICE WAINWRIGHT, JUSTICE MEDINA, JUSTICE GREEN, and JUSTICE JOHNSON joined.

JUSTICE BRISTER filed a dissenting opinion.

A high-speed police chase resulting in a traffic accident sparked a personal-injury lawsuit against the fleeing driver by the family injured in the crash. This related insurance-coverage dispute asks whether the driver's attempts to elude police forfeit coverage under an intentional-injury exclusion in his automobile liability insurance policy. We hold that the insurer did not establish as a matter of law that its insured intentionally caused the family's injuries. The exclusion requires intentional damage, not just intentional conduct. We therefore render judgment on the jury's verdict in favor of the injured family.

I. Background

Richard Gibbons was driving his pickup truck on Interstate 35 south of San Marcos when he was pulled over by a Texas state trooper. Gibbons initially stopped but then fled, with the trooper in hot pursuit chasing him into San Marcos. There, three local police officers responded and continued the pursuit. Gibbons exited the interstate and raced through the city, winding his way through urban and residential areas of San Marcos at speeds in excess of eighty miles per hour.

Gibbons left San Marcos on Highway 80 and entered a rural area, topping 100 miles per hour and swerving into oncoming traffic to pass slower vehicles. He drove off the road and through a freshly plowed cornfield, then turned around and headed back towards San Marcos on a road running parallel to Highway 80. One San Marcos police officer tried to block the road with her cruiser, but Gibbons veered off the road and went around her.

Gibbons continued and approached the intersection with Old Bastrop Road in a rural area that, according to trial testimony, “does not have businesses or houses or anything,” but rather consists of “open fields, corn fields.” Gibbons reached the intersection at the same time as a car carrying the Tanner family, who had the right-of-way. Gibbons slammed on his brakes but could not avoid the collision. All four Tanners suffered injuries, but seven-year-old Roney’s were the most serious, as he was sitting where Gibbons’ truck struck the car.¹ Gibbons fled the accident scene, doubling back and eventually driving into yet another field. Determined to end the chase, an officer

¹ Roney spent over a month in the hospital (a week of that comatose) and five years in physical therapy.

shot out two of the truck's tires. Officers forcibly removed Gibbons from his truck and placed him under arrest.

The Tanners sued Gibbons and obtained a default judgment.² 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, "because, as a matter of law, the intentional-acts exclusion in Gibbons' liability policy excluded any coverage for the Tanners' claims."³

II. Discussion

A. Standard of Review

We review a JNOV under a no-evidence standard,⁴ meaning we "credit evidence favoring the jury verdict if reasonable jurors could, and disregard contrary evidence unless reasonable jurors could not."⁵ We will uphold the jury's finding if more than a scintilla of competent evidence supports it.⁶ "The final test for legal sufficiency must always be whether the evidence at trial would

² Gibbons was jailed and charged with eight felonies: four counts of aggravated assault and four counts of failure to stop and render aid. He posted \$10,000 bail and vanished, failing to appear at his 2001 trial. He was last seen in his hometown of Akron, Ohio.

³ 232 S.W.3d 330, 335.

⁴ *City of Keller v. Wilson*, 168 S.W.3d 802, 823 (Tex. 2005).

⁵ *Cent. Ready Mix Concrete Co. v. Islas*, 228 S.W.3d 649, 651 (Tex. 2007).

⁶ *Wal-Mart Stores, Inc. v. Miller*, 102 S.W.3d 706, 709 (Tex. 2003) (per curiam).

enable reasonable and fair-minded people to reach the verdict under review.”⁷ Thus, to merit the trial court’s JNOV, Nationwide was required to show that the evidence conclusively proved that Gibbons intentionally injured the Tanners and that no reasonable jury was free to think otherwise.

B. The Policy’s Express Terms Decide This Case

Since insurance policies are contracts, we construe them using ordinary rules of contract interpretation.⁸ Our cardinal concern is determining the parties’ intent as reflected in the terms of the policy itself.⁹ Accordingly, we give policy language its plain, ordinary meaning unless something else in the policy shows the parties intended a different, technical meaning.¹⁰

Nationwide contends that when Gibbons fled police, he voided coverage under the policy’s intentional-injury exclusion, which withholds coverage for:

Property damage or bodily injury caused intentionally by or at the direction of an insured, including willful acts the result of which the insured knows or ought to know will follow from the insured’s conduct.

⁷ *City of Keller*, 168 S.W.3d at 827.

⁸ *Utica Nat’l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 202 (Tex. 2004).

⁹ *Id.*

¹⁰ *See Nat’l Union Fire Ins. Co. of Pittsburgh, PA v. Crocker*, 246 S.W.3d 603, 606 (Tex. 2008); *Gonzalez v. Mission Am. Ins. Co.*, 795 S.W.2d 734, 736 (Tex. 1990).

1. “Property damage or bodily injury caused intentionally . . .”

We have not construed this precise policy language before.¹¹ At the outset, however, we 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.

A contrary reading of the exclusion—that reckless acts absent deliberate injury are sufficient to forfeit coverage—“would render insurance coverage illusory for many of the things for which insureds commonly purchase insurance.”¹² For example, Texas mandates liability coverage for drivers,¹³ 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. As one leading commentator puts it, coverage can still exist “when the injury was unintended, even if the act which gave rise to the injury was intentional.”¹⁴

¹¹ Although the policy in this case is from Ohio, the standard Texas Personal Automobile Policy promulgated by the Texas Department of Insurance (but subject to approved variations) has a similar liability exclusion for an insured “[w]ho intentionally causes bodily injury or property damage.” While this language is congruous to the first half of the exclusion in this case, the Texas exclusion does not have the “including willful acts the result of which the insured knows or ought to know will follow from the insured’s conduct” addition. Notably, the standard Texas policy has an exclusion under the Personal Injury Protection Coverage for “bodily injury sustained . . . [b]y that person while attempting to elude arrest by a law enforcement official” but does not have that same exclusion under the Liability Coverage.

¹² *Trinity Universal Life Ins. Co. v. Cowan*, 945 S.W.2d 819, 828 (Tex. 1997) (holding that insured’s intentional conduct can nevertheless be an “accident” under homeowner’s policy if the injury was not intended); see *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 377 (Tex. 1993) (noting that the same reasoning applicable to construing the policy term “accidents” is applicable to construing an intentional-injury exclusion).

¹³ TEX. TRANSP. CODE § 601.051.

¹⁴ COUCH ON INSURANCE 3D 119:8 (2005).

We construed similar language in *State Farm Fire & Casualty Co. v. S.S.*¹⁵ In that case, a summary-judgment appeal, the plaintiff in an underlying suit claimed she contracted a sexually transmitted disease from the insured.¹⁶ The insured’s homeowner’s policy contained an intentional-injury exclusion applicable “to bodily injury or property damage caused intentionally by or at the direction of the Insured.”¹⁷ The insurer contested coverage based on this exclusion.¹⁸ In deciding what “intentionally” meant in the exclusion, we drew guidance from the Restatement (Second) of Torts and a leading treatise.¹⁹ Reading the exclusion under these authorities, we reasoned that an insured intends to cause harm if he intends or desires the consequences of his act or believes the consequences are substantially certain to occur.²⁰ Accordingly, we held that although the insured

¹⁵ 858 S.W.2d 374 (Tex. 1993).

¹⁶ *Id.* at 375.

¹⁷ *Id.* at 377 (alterations omitted).

¹⁸ *Id.* at 375.

¹⁹ *Id.* at 378.

²⁰ *Id.* (citing RESTATEMENT (SECOND) OF TORTS § 8A (1965) and W. PAGE KEETON ET AL., PROSSER & KEETON ON THE LAW OF TORTS § 8, at 35-36 (5th ed. 1984)). We quoted this passage:

[I]ntent is broader than a desire or purpose to bring about physical results. It extends not only to those consequences which are desired, but also to those which the actor believes are substantially certain to follow from what the actor does On the other hand, the mere knowledge and appreciation of a risk-something short of substantial certainty-is not intent. The defendant who acts in the belief or consciousness that the act is causing an appreciable risk of harm to another may be negligent, and if the risk is great the conduct may be characterized as reckless or wanton, but it is not an intentional wrong. In such cases the distinction between intent and negligence obviously is a matter of degree. The line has been drawn by the courts at the point where the known danger ceases to be only a foreseeable risk which a reasonable person would avoid, and becomes in the mind of the actor a substantial certainty.

Id. (quoting KEETON ET AL., *supra*, at 35-36).

intentionally had sexual relations with the plaintiff without informing her of his condition, this conduct did not establish as a matter of law that he intended to give her an STD or knew that transmission was substantially certain to follow.²¹

A similar analysis applies to the Nationwide policy, which, like the policy in *S.S.*, excludes coverage where the injury is “caused intentionally” by the insured. The evidence at trial does not indicate, as the jury charge puts it, that “the property damage or bodily injury to the Tanners was caused intentionally,” much less indicate such intent as a matter of law. On the contrary, Gibbons slammed on his brakes hard enough to skid before impact, showing he actively tried to avoid the collision. The insured in *S.S.* only *hoped* to avoid causing harm while Gibbons actually, if belatedly, *tried* to avoid causing harm.

Nor does the evidence establish as a matter of law that Gibbons believed his conduct was substantially certain to injure the Tanners. While leading police on a protracted high-speed chase is not merely reckless but reprehensible, we cannot say on this record that no reasonable juror could resist finding that injury to others was unavoidable. In fact, the chase could have ended in any number of ways: with Gibbons rolling his vehicle, with Gibbons hitting a fixed object, with officers using preventive techniques to stop Gibbons’ vehicle, or even with officers discontinuing the pursuit, rather than with Gibbons crashing into the Tanners. Nationwide therefore did not establish as a matter of law that the Tanners’ injuries were “caused intentionally” under the exclusion.

²¹ *S.S.*, 858 S.W.2d at 378.

**2. “. . . willful acts the result of which the insured knows
or ought to know will follow”**

Nationwide’s policy exclusion has additional language excluding coverage for “willful acts the result of which the insured knows or ought to know will follow.” Insofar as this passage also focuses on whether the insured intended the injurious *result*, the language reinforces the view that the dispositive inquiry is whether the insured intended to inflict damage or injury. To forfeit coverage, the insured must intend to harm, not merely intend to act.

This part of Nationwide’s exclusion also denies coverage if the insured “ought to know” that injury will result. This language might be read as stating an alternative objective test,²² excluding coverage not only where the insured subjectively knew that injury would follow, but also where a reasonable person would know that injury would follow.

However, this objective ground for denying coverage does not alter the unequivocal “will follow” language that completes the sentence. The clause requires that the insured “ought to *know*” that the resulting injury “*will* follow,” not “might follow” or “will likely follow” or anything else. “Will” is “used to express inevitability.”²³ Tracking precisely the language of the exclusion, the jury charge—to which Nationwide did not object—asked whether “the property damage or bodily injury to the Tanners was caused intentionally by or at the direction of [Gibbons], including willful acts the result of which [Gibbons] knows or ought to know would follow from his conduct.”

²² See *Nationwide Mut. Ins. Co. v. Jones*, No. Civ. JFM-05-2792, 2006 WL 361336, at *3 n.3 (D. Md. Feb. 15, 2006) (noting that “ought to know” language in identical Nationwide policy exclusion suggests an objective rather than a subjective analysis).

²³ WEBSTER’S THIRD NEW INTERNATIONAL DICTIONARY 2617 (2002).

Under the evidence presented at trial, a reasonable and fair-minded jury would not be compelled to find, under an objective standard, that a reasonable person would know that injury to third parties would result from Gibbons' conduct. Such a jury finding was no more required by the evidence than a finding, under a subjective standard, that Gibbons personally knew that such injury would result. Hence, we part company with the dissent on the effect of the "ought to know" language of the exclusion, and cannot say a reasonable jury in this case would necessarily find that Gibbons ought to have known that injury would result from his conduct, as indisputably reckless as it was. Put simply, the injury was not so inevitable that we can say as a matter of law it was intended.

Nationwide relies on *Nationwide Mutual Insurance Co. v. Finkley*,²⁴ an Ohio intermediate appeals court decision that construed the same policy exclusion and concluded "no coverage." We find *Finkley* unpersuasive as it misapplies the policy exclusion. Although *Finkley* describes a Texas-like standard that would bar coverage where the insured's conduct is "substantially certain to result in injury,"²⁵ *Finkley* actually applies a different standard, opining that "[a]ny reasonable person would know, or should know, that such actions [of the driver] would probably lead to serious injury."²⁶ In our view, this reading departs from the controlling policy language. The exclusion does not apply whenever a reasonable person would or should know that his actions "would probably

²⁴ 679 N.E.2d 1189 (Ohio Ct. App. 1996).

²⁵ *Id.* at 1190-91.

²⁶ *Id.* at 1190. Given the facts of *Finkley*, the Ohio court's no-coverage conclusion is understandable under a looser "would probably lead" test. *Finkley* involved an unlicensed teenager who crashed in an urban area, not, as in our case, a licensed adult who crashed in a rural area. Moreover, unlike our case, *Finkley* includes no evidence regarding the driver's subjective intent to avoid causing injury.

lead” to injury; the policy imposes a stricter test, that the driver ought to know that injury “will follow” from his conduct.

We understand the appeal of a broader exclusion that would withhold coverage for, as Nationwide’s predecessor policy put it, “willful acts which can be reasonably expected to result in damage or injury.” But Nationwide replaced that test with the more restrictive version that controls today’s case. We must construe the policy as written, not as we might have written it nor as Nationwide once wrote it. Given the clarity of the exclusion and the jury charge, which mirrors the exclusion virtually verbatim, we cannot conclude jurors disregarded the policy and the evidence in reaching their verdict, much less conclude they were obliged to reach the opposite result.

III. Conclusion

Because Nationwide did not establish as a matter of law that Gibbons intentionally caused the Tanners’ injuries, the jury’s verdict must stand. Accordingly, we reverse the court of appeals’ judgment and render judgment on the jury verdict.

Don R. Willett
Justice

OPINION DELIVERED: April 17, 2009.