IN THE SUPREME COURT OF TEXAS

No. 07-0760

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

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE ELEVENTH DISTRICT OF TEXAS

Argued October 14, 2008

JUSTICE BRISTER filed a dissenting opinion.

Anyone who drives a huge 4-ton pickup at 100 miles an hour through city streets during rush hour "ought to know" that someone is going to get hurt. This insurance policy excluded such conduct, so the judges of the trial court and court of appeals correctly denied coverage. Because the Court holds otherwise, I respectfully dissent.

There will never be a more extreme case than this. After being pulled over by a state trooper around 5 p.m. on Interstate 35 in San Marcos, Richard Gibbons took off in his Ford F-350 heavy-duty truck, with the trooper and then several local police cars in hot pursuit. Gibbons cut through residential neighborhoods at more than 80 miles an hour, careening around corners and running

through yield and stop signs. Turning onto Highway 80, he hit speeds above 100 miles an hour, swerving head-on into oncoming traffic to pass, cutting across open fields, and driving around a police roadblock. Ultimately he smashed into the Tanners' car at an intersection, which slowed him down only for a moment. He was finally stopped when police shot out half of the truck's six tires. Charged with eight felony counts, Gibbons was released on $10,000 bail; true to form, he fled and has never been prosecuted.

The $300,000 auto liability policy issued to Gibbons excluded "[p]roperty 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." "Ordinarily," we have said, "whether an insured intended harm or injury to result from an intentional act is a question of fact."[1] But "ordinarily" means that in some extreme cases it is *not* a question of fact, but a question of law. "Ought to know" is an objective standard, so there must be some outer boundaries beyond which an insured's conduct is either so harmless or so reckless that no fact question is presented.

Texas courts have apparently not addressed whether a high-speed police chase falls within the intentional-acts exclusion. But this Ohio insurance policy was issued to Gibbons in Ohio, and Ohio courts have. "[W]here an insured willfully and purposefully attempts to elude police in an automobile chase through an urban area in reckless disregard of traffic control devices, his actions

[1] *State Farm Fire & Cas. Co. v. S.S.*, 858 S.W.2d 374, 378 (Tex. 1993).

are substantially certain to result in injury."[2] This is both sensible and consistent with Texas law, which applies an intentional-injury exclusion if an insured "intends the consequences of his act, or believes that they are substantially certain to follow."[3]

The Court's main mistake is in viewing this accident far more narrowly than the policy does. The Court says the exclusion requires "intentional damage, not just intentional conduct," but the exclusion applies even if he did *not* intend damage but "ought to know [it] will follow from [his] conduct." The Court requires proof that the insured "intentionally injured *the Tanners*," but the exclusion does not require that an insured know precisely who or what he would hit. The Court says reasonable jurors could conclude the chase could have ended with Gibbons "rolling his vehicle" or "hitting a fixed object," but either would still be the kind of property damage he ought to have known would follow. The Court says Gibbons ought to have known the police might "discontinu[e] the pursuit," though it is a mystery why an objective, reasonable-person standard would include such an unreasonable hope. The Court focuses narrowly on the rural area of "open fields, corn fields" where an accident finally occurred, forgetting all of Gibbons' willful acts on I-35, Highway 80, and the residential areas through which this high-speed police chase passed. And the Court emphasizes that Gibbons applied his brakes before the collision, even though someone driving a truck this big this fast in these circumstances ought to know an accident would follow *even if* he tried to avoid it

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[2] *Nationwide Mut. Ins. Co. v. Finkley*, 679 N.E.2d 1189, 1191 (Oh. Ct. App. 1996).

[3] *S.S.*, 858 S.W.2d at 378 (citing RESTATEMENT (SECOND) OF TORTS § 8A (1965)).

at the last second. In sum, the Court avoids this policy exclusion by focusing narrowly on what Gibbons knew a split second before this precise crash.[4]

The rest of the Court's opinion consists largely of red herrings and straw men:

- the insurer did not object to the jury charge, but there was no reason to do so as the charge merely quoted the policy;
- the current policy exclusion is more restrictive than a former one, but the circumstances here meet either; and
- Texans need coverage from drivers who "intentionally speed or run red lights," but Gibbons did a lot more than run a red light.

It should not be debatable whether an insured "ought to know" that harm would follow from this kind of outrageous driving. The police certainly thought so, breaking off the chase in a residential area because it was too dangerous, and shooting at the truck (an act requiring supervisory approval) because the officers "felt like we needed to end it before anyone else was injured." The Tanners' attorney also thought so, conceding in his opening statement that accidents like this one "happen[] all the time when people run from police." Indeed, the most surprising thing on this record is not that there was an accident, but that someone wasn't killed. If the Court "cannot say on this record" that Gibbons ought to have known damage would follow his conduct, then courts can never say it. As a result, this explicit exclusion does not mean what it says, but whatever jurors decide they want it to say.

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[4] *See City of Keller v. Wilson*, 168 S.W.3d 802, 812 (Tex. 2005) ("[I]f evidence may be legally sufficient in one context but insufficient in another, the context cannot be disregarded even if that means rendering judgment contrary to the jury's verdict.").

Not surprisingly, that is precisely what the Tanners' counsel urged jurors to do. In his opening, he summarized the issue for trial as follows: "Does Nationwide have a technicality in this document buried in one sentence of one page that somehow lets them off the hook or not?" Exclusions, of course, are not technicalities — they are part of the contract. Jurors may naturally tend to favor a victimized family rather than a big insurance company, but judges exist to make sure contracts mean what they say, no matter whom the judges or jurors want to win.

If insurers must pay for intentional, criminal acts by policyholders like Gibbons, they will have to charge everyone higher premiums. As a result, some drivers will simply do without insurance. Ignoring the policy terms in this case may seem compassionate, but in the long run it may prove otherwise.

By any measure, an insured like Gibbons "ought to know" that driving like he did would hurt someone or something sooner or later. As his insurer did not agree to pay for that kind of intentional conduct, I would affirm the courts below.

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Scott Brister
Justice

OPINION DELIVERED: April 17, 2009