IN THE SUPREME COURT OF TEXAS

NO. 06-0106

NATIONWIDE INSURANCE COMPANY, PETITIONER,

v.

MOHAMAD ELCHEHIMI, INDIVIDUALLY AND AS PARENT AND NEXT FRIEND OF KHALED ELCHEHIMI AND LUKMAN ELCHEHIMI, MINORS, RESPONDENT

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

JUSTICE WAINWRIGHT delivered the opinion of the Court, joined by CHIEF JUSTICE JEFFERSON, JUSTICE HECHT, JUSTICE BRISTER, JUSTICE GREEN, JUSTICE JOHNSON, and JUSTICE WILLETT.

JUSTICE O'NEILL filed a dissenting opinion, joined by JUSTICE MEDINA.

This breach of contract suit stems from the denial of coverage by Nationwide Insurance Company on a claim arising from a collision between insured Mohamad Elchehimi's vehicle and an axle-wheel assembly separated from an unidentified semi-trailer truck. The court of appeals reversed the trial court's grant of summary judgment in favor of Nationwide. Because there was no actual physical contact between Elchehimi's vehicle and the unidentified truck as required by statute to trigger the uninsured motorist coverage, we reverse the court of appeals' judgment.

On January 4, 2002, Mohamad Elchehimi's station wagon collided with a drive axle and attached tandem wheels that had separated from an eighteen-wheel semi-trailer truck. The unidentified truck, which was being driven in the opposite direction on a divided highway, did not stop. Momentum carried the axle-wheel assembly across the dividing median where it struck

Elchehimi's vehicle, injuring the occupants and damaging the car. Elchehimi had purchased from Nationwide a standard Texas personal automobile insurance policy, including the optional statutorily defined unidentified motorist coverage. Nationwide denied Elchehimi's claim for uninsured motorist benefits because the impact between Elchehimi's vehicle and the axle-wheel assembly was not "actual physical contact" with an unknown "motor vehicle" as required by the terms of the policy and the Texas Insurance Code.

Elchehimi sued Nationwide for breach of contract and breach of the duties of good faith and fair dealing. Nationwide moved for summary judgment, arguing that no actual physical contact occurred between Elchehimi's vehicle and the unidentified truck. The trial court granted the motion. A divided court of appeals reversed, concluding that an issue of fact remained as to whether actual physical contact occurred. 183 S.W.3d 833, 839. Specifically, the court of appeals interpreted the Texas uninsured/underinsured motorist statute, then article 5.06-1(2)(d) of the Texas Insurance Code,[1] to require actual physical contact only with an "integral part" of an unidentified motor vehicle as a "result of an unbroken chain of events with a clearly definable beginning and ending, occurring in a continuous sequence" rather than actual physical contact with a motor vehicle. *Id.* at 838–39; *see also Brooks v. State Farm Mut. Auto. Ins. Co.*, 2003-0389, p. 7 (La. App. 4 Cir. 9/24/03); 855 So. 2d 419, 424 (citing references omitted). Nationwide petitioned this Court for review.

[1] In 2005, the Legislature repealed Article 5.06-1(2)(d) as part of the codification of the Texas Insurance Code. The same language now appears in section 1952.104(3) of the Texas Insurance Code. Accordingly, the Court will retroactively apply Section 1952.104(3). *See Subaru of Am., Inc. v. David McDavid Nissan, Inc.*, 84 S.W.3d 212, 219–20 (Tex. 2002) (retroactive application is constitutional where the change is remedial and procedural and does not affect a vested right).

The parties do not dispute the facts of the collision and agree that the following statutory provision, which provides the parameters of coverage for damage or injury caused by unidentified motorists in Texas, governs this dispute:

> [F]or the insured to recover under the uninsured motorist coverage if the owner or operator of any motor vehicle that causes bodily injury or property damage to the insured is unknown, *actual physical contact* must have occurred between the motor vehicle owned or operated by the unknown person and the person or property of the insured.

TEX. INS. CODE § 1952.104(3) (emphasis added). The relevant policy language is consistent with the statute. To survive summary judgment, Elchehimi must raise a fact issue that his vehicle's collision with the axle-wheel assembly qualified as "actual physical contact" with a "motor vehicle" or a legally recognized substitute for such contact.

Because there was actual physical contact between Elchehimi's vehicle and the axle-wheel assembly, we examine whether the assembly is a motor vehicle under the Texas Insurance Code. Section 1952.104(3) does not define motor vehicle. However, the common usage of the term motor vehicle does not include a single axle attached to two wheels. *See Slaughter v. Abilene State Sch.*, 561 S.W.2d 789, 791–92 (Tex. 1977). "Common usage has made the phrase 'motor vehicle' a generic term for all classes of self-propelled vehicles not operating on stationary rails or tracks." *Id.* at 792. In addition, other relevant statutory definitions aid our analysis. The Texas Insurance Code expressly incorporates the Texas Motor Vehicle Safety-Responsibility Act, chapter 601 of the Transportation Code. TEX. INS. CODE § 1952.101(a). Chapter 601 sets minimum coverage amounts for vehicle liability insurance, and those amounts explicitly apply to uninsured motorist coverage. TEX. TRANSP. CODE § 601.072. Because Section 1952.104(3) and Chapter 601 address the same subject matter—motor vehicle insurance—the definition of motor vehicle in section 601.002 of the

Transportation Code is persuasive, if not controlling. Chapter 601 defines a motor vehicle as "a self-propelled vehicle designed for use on a highway, a trailer or semitrailer designed for use with a self-propelled vehicle, or a vehicle propelled by electric power from overhead wires and not operated on rails." TEX. TRANSP. CODE § 601.002(5).

A drive axle with two tandem wheels attached on one side lacks an engine or other means of propulsion. It is therefore neither a self-propelled vehicle nor a vehicle propelled by electric power from overhead wires. This wheel assemblage is not capable of carrying a load, nor can it be towed down a road by a self-propelled vehicle other than being dragged by or mounted underneath one, as Elchehimi's expert witness testified. The axle-wheel assembly is thus not a trailer or semitrailer designed for use with a self-propelled vehicle. The axle-wheel assembly is not a motor vehicle under Chapter 601. Applying the common usage of the term and the definition in Chapter 601, we conclude that physical contact with a detached axle and tandem wheels is not actual physical contact with a motor vehicle under the unidentified motor vehicle provision.

Elchehimi also argues that this collision involved a legally recognized substitute for the statute's actual physical contact requirement. In *Latham v. Mountain States Mutual Casualty Co.*, the court of appeals determined that the physical contact requirement could be satisfied through indirect contact where an unidentified vehicle first impacts an intermediary vehicle that in turn collides with an insured claimant. 482 S.W.2d 655, 657 (Tex. Civ. App.—Houston [1st Dist.] 1972, writ ref'd n.r.e.). The court of appeals held that "[w]here a Car A strikes Car B and propels it into Car C, there is physical contact between Car A and Car C" within the meaning of an automobile insurance policy that required physical contact with an unidentified vehicle. *Id.*

No Texas court, however, has ever relied on *Latham* to conclude that physical contact occurred where there was no "Car B." *Cf. Old Am. County Mut. Fire Ins. Co. v. Sanchez*, 81 S.W.3d 452, 462 (Tex. App.—Austin 2002) (observing, but not holding, that *Latham*'s rule "survives in the fact situation . . . where car A hits car B which then hits car C" in a case where an uninsured motorist hit an insured's vehicle, causing the vehicle to collapse on the insured), *rev'd on other grounds*, 149 S.W.3d 111 (Tex. 2004). Only two motor vehicles were involved in Elchehimi's collision: the unidentified truck and Elchehimi's station wagon. Because the axle-wheel assembly is not a motor vehicle, it cannot fill the role of an intermediary vehicle to provide indirect contact between the unidentified truck and Elchehimi's vehicle. *Latham* is further distinguishable because the court in *Latham* was interpreting insurance policy language, not a statute, and the policy language did not have an actual physical contact requirement. *Latham*, 482 S.W.2d at 657. Five years after *Latham*, the Legislature added the actual physical contact requirement to the uninsured motorist statute. *See* Act of May 6, 1977, 65th Leg., R.S., ch. 182, § 1, art. 5.06-1(2)(d), 1977 Tex. Gen. Laws 370, 371 (repealed 2005).

No other substitute exists for the requirement of actual physical contact with the motor vehicle itself. Texas courts have uniformly rejected the contention that a collision with cargo and other objects falling from a car satisfies the requirement of actual physical contact with a motor vehicle. *See, e.g.*, *Tex. Farmers Ins. Co. v. Deville*, 988 S.W.2d 331, 333–34 (Tex. App.—Houston [1st Dist.] 1999, no pet.) (holding that water pump falling from truck and striking insured was not actual physical contact with a motor vehicle); *Republic Ins. Co. v. Stoker*, 867 S.W.2d 74, 77–78 (Tex. App.—El Paso 1993) (holding that insured rear-ending another car that was trying to avoid furniture dropped on the highway by an unknown driver was not actual physical contact with an

unknown vehicle), *rev'd on other grounds*, 903 S.W.2d 338 (Tex. 1995); *Williams v. Allstate Ins. Co*, 849 S.W.2d 859, 861 (Tex. App.—Beaumont 1993, no writ) (holding that collision between the claimant's vehicle and a steel pipe dropped from an exiting truck was not actual physical contact with a motor vehicle). Another court of appeals considering the issue of contact with parts of the vehicle itself, rather than simply cargo, has concluded that such contact is also not enough to satisfy this strict requirement. *See Smith v. Nationwide Mut. Ins. Co.*, No. 04-02-00646-CV, 2003 WL 21391534, 2003 Tex. App. LEXIS 5056, at *6–8 (Tex. App.—San Antonio June 18, 2003, pet. denied) (holding that collision between loading ramp that detached from trailer and insured's vehicle was not actual physical contact with a motor vehicle). We agree that a collision with a separated piece of a motor vehicle, such as an axle-wheel assembly, is not actual physical contact with the motor vehicle as specifically required by the statute.

The dissent argues we should follow the court of appeals' suggestion that Texas adopt an integral part test to determine whether actual physical contact occurred. 183 S.W.3d at 835. We decline, however, to adopt an integral part test not present in the text of the statute and inconsistent with the relatively bright line established by the Legislature. Moreover, such a test would be practically unmanageable, requiring a case-by-case analysis to determine if a part was substantial enough to serve as a proxy for a motor vehicle. This would lead to a line-drawing conundrum for courts of appeals. The Legislature did not create an exception to the statute's requirement of actual physical contact with a motor vehicle, and we decline to do so.

In search of support for such an integral part test, the dissent and the court of appeals look to other state jurisdictions and the interpretation of those states' unidentified motorist statutes. Although interesting, we do not believe this analysis is necessary because the language of the Texas

statute is not ambiguous. *See Tex. Dep't of Protective & Reg. Servs. v. Mega Child Care, Inc.*, 145 S.W.3d 170, 177 (Tex. 2004) ("If the statutory text is unambiguous, a court must adopt the interpretation supported by the statute's plain language unless that interpretation would lead to absurd results.") In addition, the dissent's citations show there is no trend from which to glean a majority rule. Of the seven states the dissent identifies as having physical contact requirements in their unidentified motorist statutes and as having considered the integral part test, two have statutory language different than Texas,[2] four have adopted the test,[3] and one has rejected it.[4] Of the four states with cases adopting the integral part test, three have done so only at the intermediate appellate court level. At best, there is guidance from the highest courts of two states, New York and South Carolina, and they reach opposite conclusions on the issue.

The dissent agrees that the Texas uninsured motorist statute should be liberally construed to protect insureds "who are legally entitled to recover damages from owners or operators of uninsured or underinsured motor vehicles." *Stracener v. United Serv. Auto. Ass'n*, 777 S.W.2d 378, 382 (Tex. 1989). Liberally construing a provision, however, does not permit divorcing its application from the words in the statute. The dissent states that our construction "does nothing to further the anti-fraud purpose behind the requirement of 'physical contact' with a 'motor vehicle.'" To the contrary, creation of an integral part test would force courts to draw lines in each case along a continuum, to

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[2] *See* LA. REV. STAT. ANN. § 22:680(1)(d)(i) (LEXIS through 2007 Sess.) (allowing testimony by a disinterested witness in place of actual physical contact); WIS. STAT. ANN. §§ 632.32(2)(a), .32(4)(a)(2)(b) (LEXIS through 2007 Sess.) (covering "hit-and-run" accidents with unidentified vehicles).

[3] *See State Farm Fire & Cas. Co. v. Guest*, 417 S.E.2d 419, 422 (Ga. Ct. App. 1992); *Illinois Nat. Ins. Co. v. Palmer*, 452 N.E.2d 707, 709 (Ill. App. Ct. 1983); *Adams v. Mr. Zajac*, 313 N.W.2d 347, 349 (Mich. Ct. App. 1981); *Allstate Ins. Co. v. Killakey*, 580 N.E.2d 399, 401 (N.Y. 1991).

[4] *See Davis v. Doe*, 331 S.E.2d 352, 353–54 (S.C. 1985).

determine whether a particular part was large or important enough to be "integral," whether the part was a piece of the vehicle or merely cargo, and whether the part was contemporaneously separated from the vehicle or had lain in the roadway long enough to become debris. All of these questions would open the door to uncertainty and potential fraudulent or fictitious claims, which the Legislature saw fit not to do. *See Davis*, 331 S.E.2d at 354 ("The requirement of physical contact with the unknown vehicle, and not just with an unattached part thereof, is a viable manner of preventing fraudulent, fictitious claims."). The Legislature drew a relatively bright line, and we decline to fuzz it up. Requiring contact with the motor vehicle honors the language enacted by the Legislature and enforces the legislative purposes of protecting insured motorists and preventing fraud.

The language of the statute compels our conclusion. The salient factor here is that the insured's vehicle did not make actual physical contact with the unidentified vehicle. Whether the item that did make contact with the insured's vehicle was initially a piece of the unidentified vehicle or was cargo that had fallen off is irrelevant—in either case the item is not a motor vehicle. For these reasons, and without hearing argument, we reverse the judgment of the court of appeals, render judgment for Nationwide, and order that Elchehimi take nothing. TEX. R. APP. P. 59.1.

J. Dale Wainwright
Justice

OPINION DELIVERED: March 28, 2008