United States Court of Appeals for the Fifth Circuit

United States Court of Appeals
Fifth Circuit
FILED
April 4, 2022
Lyle W. Cayce
Clerk

No. 21-10749

PENN-AMERICA INSURANCE COMPANY,

Plaintiff—Appellee,

versus

TARANGO TRUCKING, L.L.C.,

Defendant—Appellant.

Appeal from the United States District Court
for the Northern District of Texas
USDC No. 3:20-CV-1388

Before DAVIS, WILLETT, and OLDHAM, *Circuit Judges*.

W. EUGENE DAVIS, *Circuit Judge*:

Tarango Trucking, L.L.C. ("Tarango") appeals from a judgment declaring that its insurer, Penn-America Insurance Company ("Penn-America"), owes neither defense nor indemnity with respect to third-party claims against Tarango concerning a fatal accident on its property. Specifically, the district court held that the insurance policy's automobile exclusion applied to bar coverage over the claims, and an exception to that exclusion did not restore coverage. We disagree with the latter conclusion. Accordingly, we REVERSE in part, VACATE in part, and REMAND to the district court for further proceedings.

I.

This insurance coverage dispute arises from a tragic accident on Tarango's property that resulted in the death of SirMyron Birks-Russell ("Birks-Russell"), a truck driver employed by WS Excavation, LLC ("WS"). Birks-Russell's survivors sued Tarango and WS in Texas state court ("the Underlying Action"). Their second amended petition ("Petition") states in relevant part:

> On March 2, 2020, [Birks-Russell] drove the tractor trailer assigned to him by [WS] to Tarango[']s] property[ ] . . . . [Birks-Russell] parked his tractor trailer and proceeded to inspect and off-load the heavy equipment. Off-loading the heavy equipment required [Birks-Russell] to operate a hydraulic lift on the trailer after first unhitching the tractor from the trailer.
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> [Birks-Russell] unhitched the tractor and attempted to operate the hydraulic lift on the trailer. While operating the lift, the tractor's braking system disengaged, causing the tractor to roll back and strike [Birks-Russell], crushing and pinning his body—while still [a]live—beneath the weight of the tractor. Additionally, because the parking lot was maintained at a dangerous slope, the heavy semi-truck and trailer quickly rolled back. Due to the dangerous slope and grade of the trucking lot, the tractor struck the trailer with such force that it forced the trailer backwards into [Birks-Russell's] parked personal vehicle, causing significant property damage to [his] vehicle.
>
> . . . .
>
> This tragic death occurred because [WS] failed to properly maintain the tractor, its accompanied electronic and

> braking systems, and/or trailer . . . .
>
> This tragic death also occurred because Tarango . . . failed to maintain a level parking and loading facility, where dozens of trucks are stored, parked, and off-loaded. Failing to maintain a level parking lot, where dangerous and heavy equipment [is] routinely offloaded and parked, posed a serious likelihood that this unlevel parking lot would eventually cause serious injury and/or death. A level parking lot is required by industry standards and guidelines to prevent dangerous and heavy equipment and trucks from rolling back and causing severe injury or death. But, [Tarango] . . . refused to ensure that their parking lot was flat and safe for drivers to unload heavy equipment and park large eighteen-wheeler trucks at their facility . . . .

At the time of the accident, Tarango was insured under a commercial general liability policy issued by Penn-America ("the Policy"). Tarango tendered the claims in the Underlying Action to Penn-America and requested defense. Penn-America defended Tarango but reserved its right to contest coverage.

Penn-America then filed a declaratory judgment action in federal district court where it sought to have its and Tarango's rights concerning the Policy and the Underlying Action determined. Penn-America argued, inter alia, that the allegations in the Petition fell within the Policy's "Auto Exclusion," which negated coverage along with Penn-America's defense and indemnity obligations. Tarango filed an answer and counterclaim seeking a declaration that Penn-America must defend it in the Underlying Action. Tarango asserted that the Auto Exclusion does not apply to the claims in the Petition, but even if it does, the "Parking Exception" to the Auto Exclusion restores coverage.

The parties filed cross-motions for summary judgment, which were referred to a magistrate judge for a report and recommendation. The magistrate judge issued a written decision that recommended granting Penn-America's motion and denying Tarango's motion. The district court accepted the recommendation over Tarango's objection and entered a judgment declaring that Penn-America has no duty to defend or indemnify Tarango in the Underlying Action.

Tarango timely appealed.

II.

"We review a district court's judgment on cross motions for summary judgment de novo, addressing each party's motion independently, viewing the evidence and inferences in the light most favorable to the nonmoving party."[1] Summary judgment is proper "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law."[2]

III.

Texas law governs the insurance issues in this diversity case.[3]

A.

The Policy contains both a duty to defend and a duty to indemnify.[4]

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[1] *Rossi v. Precision Drilling Oilfield Servs. Corp. Emp. Benefits Plan*, 704 F.3d 362, 365 (5th Cir. 2013) (citations and quotations omitted).

[2] FED. R. CIV. P. 56(a).

[3] *See Primrose Operating Co. v. Nat'l Am. Ins. Co.*, 382 F.3d 546, 552 n.4 (5th Cir. 2004).

[4] The Policy states:

> We will pay those sums that the Insured becomes legally obligated to pay as damages because of "bodily injury" or "property damage" to which this insurance applies. We will have the right and duty to defend the

"These duties are independent, and the existence of one does not necessarily depend on the existence or proof of the other."[5] "This Court reviews whether an insurer has a duty to defend its insured in an underlying suit as a *de novo* question of law."[6]

The insured bears the initial burden of establishing that the insurer has a duty to defend.[7] "Under the eight-corners or complaint-allegation rule, an insurer's duty to defend is determined by the third-party plaintiff's pleadings, considered in light of the policy provisions, without regard to the truth or falsity of those allegations."[8] If the petition or complaint alleges at least one cause of action potentially within the policy's coverage, then the insurer is obligated to defend the insured.[9] This rule is applied liberally, with any doubts resolved in favor of the insured.[10] "[C]ourts look to the factual allegations showing the origin of the damages claimed, not to the legal theories or conclusions alleged."[11]

If the insured carries its burden, it shifts to the insurer to show "that the plain language of a policy exclusion or limitation allows the insurer to

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> Insured against any "suit" seeking those damages. However, we will have no duty to defend the Insured against any "suit" seeking damages for "bodily injury" or "property damage" to which this insurance does not apply.

[5] *D.R. Horton-Texas, Ltd. v. Markel Int'l Ins. Co.*, 300 S.W.3d 740, 745 (Tex. 2009).

[6] *Northfield Ins. Co. v. Loving Home Care, Inc.*, 363 F.3d 523, 527 (5th Cir. 2004) (citation omitted) (applying Texas law).

[7] *Id.* at 528 (citation omitted).

[8] *GuideOne Elite Ins. Co. v. Fielder Rd. Baptist Church*, 197 S.W.3d 305, 308 (Tex. 2006) (citations omitted).

[9] *Northfield*, 363 F.3d at 528.

[10] *Primrose Operating Co.*, 382 F.3d at 552 (citation omitted).

[11] *Ewing Constr. Co. v. Amerisure Ins. Co.*, 420 S.W.3d 30, 33 (Tex. 2014) (citation omitted).

avoid coverage of *all* claims, also within the confines of the eight corners rule."[12] When interpreting a policy exclusion, any doubts regarding the duty to defend are resolved in favor of the insured.[13] If an exclusion is subject to more than one reasonable construction, we adopt the interpretation urged by the insured as long as it is not unreasonable and even if the insurer's interpretation "appears to be more reasonable or a more accurate reflection of the parties' intent."[14]

If the insurer proves that an exclusion applies, the insured must show that an exception to the exclusion reinstates coverage.[15] An exception to an exclusion is interpreted broadly in favor of coverage, "[b]ut that principle does not mean we should distort the exception in order to find coverage where none exists."[16]

B.

The Policy generally obligates Penn-America to defend Tarango against any "suit" seeking damages for "bodily injury" or "property damages" caused by an "occurrence." Penn-America concedes that the Underlying Action satisfies these requirements. Consequently, Penn-America must show that the plain language of an exclusion avoids coverage of all claims, within the confines of the eight corners rule. Penn-America argues that the Policy's Auto Exclusion satisfies this burden.

The Auto Exclusion is contained in an endorsement to the Policy and

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[12] *Northfield*, 363 F.3d at 528 (emphasis in original) (citations omitted).

[13] *State Farm Lloyds v. Richards*, 966 F.3d 389, 393 (5th Cir. 2020) (citation omitted) (applying Texas law).

[14] *Gilbert Tex. Constr., L.P. v. Underwriters at Lloyd's London*, 327 S.W.3d 118, 133 (Tex. 2010) (citation and quotations omitted).

[15] *Id.* at 124.

[16] *Id.* at 134–35 (citation omitted).

states in part:

> This insurance does not apply to:
> "Bodily injury" or "property damage" arising out of the ownership, maintenance or use by any person or entrustment to others, of any aircraft, "auto", or watercraft.
> . . . Use includes operation and "loading or unloading".

Four exceptions appear immediately beneath the Auto Exclusion. They state:

> This exclusion does not apply to:
>
> (1) A watercraft while ashore on premises you own or rent,
>
> (2) A watercraft you do not own that is;
>
> (a) Less than 26 feet long; and
>
> (b) Not being used to carry persons or property for a charge
>
> (3) *Parking an "auto" on, or on the ways next to, premises you own or rent provided the "auto" is not owned by or rented or loaned to you or the insured*;
>
> (4) "Bodily injury" or "property damage" arising out of the operation of any the equipment listed in paragraph f.(2) or f.(3) of the definition of "mobile equipment".

(emphasis added). The third exception is the "Parking Exception."

Penn-America contends that Birks-Russell's injury and death "ar[ose] out of" the "use" or "maintenance" of the tractor trailer; therefore, the Auto Exclusion precludes coverage of the Underlying Action. Tarango offers several reasons why the Auto Exclusion does not apply to one or more claims in the Petition. Tarango further asserts that even if the Auto Exclusion applies, the Parking Exception also applies and restores coverage.

As explained below, we agree with Tarango's alternative argument that the Parking Exception restores coverage over at least one of the claims in the Petition. Therefore, we pretermit discussion of whether the Auto Exclusion applies. We assume without deciding that it does and turn our

attention to the Parking Exception.

C.

As mentioned, the burden is on the insured, Tarango, to prove that the Parking Exception restores coverage.[17] However, we must "interpret an exception to an exclusion broadly in favor of coverage," although we cannot "distort the exception in order to find coverage where none exists."[18]

The district court interpreted the Parking Exception as reinstating coverage over injuries and property damage that occur during the act of parking, not after a vehicle is parked. It concluded the Parking Exception did not apply because Birks-Russell was not injured while parking an auto. "Rather, the tractor rolled back and struck him when he was unloading the trailer," which occurred after he had parked and unhitched the tractor from the trailer.

Tarango, however, contends that the Parking Exception should be interpreted as restoring coverage over bodily injuries that "arise out of" parking—a phrase that is construed broadly to mean "'there is simply a 'causal connection or relation,' . . . that there is but for causation, though not necessarily direct or proximate causation.'"[19] Tarango argues that the Petition's allegations that "[Birks-Russell] parked his tractor trailer," and "the tractor's braking system disengaged, causing the tractor to roll back and strike [Birks-Russell]," and Tarango "fail[ed] to maintain a level parking lot" are claims arising out of parking to which the Parking Exception applies.

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[17] *Id.* at 124.

[18] *Id.* at 134–35.

[19] *Mid-Continent Cas. Co. v. Global Enercom Mgmt., Inc.*, 323 S.W.3d 151, 156 (Tex. 2010) (quoting *Utica Nat'l Ins. Co. of Tex. v. Am. Indem. Co.*, 141 S.W.3d 198, 203 (Tex. 2004)) (interpreting "arise out of" in a commercial general liability policy's automobile exclusion).

Penn-America disagrees and points out that the Parking Exception does not contain the phrase "arise out of"; it merely states that the Auto Exclusion "does not apply to . . . [p]arking." In Penn-America's view, then, the exception does not apply to "parked" autos, "after parking," to injuries "arising out of parking," or if the injured person had "previously engaged in the act of parking."

The Parking Exception cannot be read in isolation.[20] It does not simply "apply to . . . [p]arking"—as Penn-America would have it—because the Policy does not cover "parking."[21] The Policy covers "bodily injury" and "property damage." The Auto Exclusion excludes from coverage "'[b]odily injury' or 'property damage' arising out of the . . . ownership, maintenance or use . . . of any . . . 'auto.'" The four exceptions therefore reinstate coverage over certain bodily injuries and property damage that would otherwise be excluded by the Auto Exclusion, notwithstanding the fact that three of the exceptions—including the Parking Exception—do not expressly mention bodily injury or property damage.

Furthermore, the Parking Exception necessarily must be understood as containing some causal language that links "'bodily injury' or 'property damage'" with "parking." Because the Parking Exception is an exception to the Auto Exclusion, it is reasonable to interpret it as employing the same, "arising-out-of" nexus as the Auto Exclusion. And, because this interpretation is reasonable and favors coverage, we adopt it even if a narrower interpretation might also be reasonable.[22] Thus, we construe the

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[20] *See Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133–34 (Tex. 1994) (explaining that an insurance contract, like other contracts, should be considered as a whole; no single phrase, sentence, or section should be read in isolation).

[21] *See Gilbert Tex. Constr., L.P.*, 327 S.W.3d at 135 ("[W]e should not distort the exception in order to find coverage where none exists.").

[22] *See id.* at 133.

Parking Exception as reinstating coverage over bodily injury and property damage that arise out of "[p]arking an 'auto' on . . . premises [Tarango] own[s] or rent[s] provided the 'auto' is not owned by or rented or loaned to" Tarango.

The Petition alleges that Birks-Russell was injured when, after parking the tractor on Tarango's lot and unhitching it from the trailer, the tractor became "unparked" and rolled backwards onto him.[23] The Petition lays part of the blame on Tarango's unlevel parking lot, describing it as so steep that it "posed a serious likelihood that [it] would eventually cause serious injury and/or death." Considering these allegations and bearing in mind that we are to construe an exception in favor of coverage, we conclude that the Petition asserts a claim for "bodily injury" "arising out of" "parking." Therefore, the Parking Exception applies to reinstate coverage.

Penn-America resists this conclusion by asserting that Birks-Russell's injury occurred as he was unloading the tractor trailer. It argues that the Parking Exception cannot encompass the unloading process, because the Auto Exclusion expressly states that "loading or unloading" constitutes an excluded "use" of an auto. In other words, Penn-America believes "unloading" and the Parking Exception are mutually exclusive.

We assume without deciding that Birks-Russell's injury arose out of "unloading" the tractor trailer, triggering the Auto Exclusion's application. Nevertheless, we conclude that where, as here, both the Auto Exclusion and the Parking Exception apply to an injury, the latter trumps the former and

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[23] Although not binding, we note that the Alabama Supreme Court interpreted a similar parking exception as encompassing both parking and "unparking." *See Generali US Branch v. The Boyd School, Inc.*, 887 So. 2d 212, 218–19 (Ala. 2004); *see also Sears, Roebuck & Co. v. Acceptance Ins. Co.*, 793 N.E.2d 736, 743 (Ill. App. Ct. 2003) (suggesting in dicta that a parking exception would apply to "unparking," but holding that the vehicle was not "unparking" at the time of the collision).

reinstates coverage. After all, the function of the Parking Exception is to restore coverage over certain injuries and property damage that would otherwise be excluded by the Auto Exclusion, which presupposes the Auto Exclusion's application in the first place.[24]

In summary, we agree with Tarango that the Parking Exception applies to bodily injury and property damage that arise out of parking. Because the Petition alleges some claims that arise out of parking and are potentially covered by the Policy, Penn-America must defend Tarango in the Underlying Action.

D.

The district court determined that Penn-America has no duty to indemnify Tarango with respect to the Underlying Action. "[T]he duty to indemnify is triggered not by the allegations in the pleadings but by whether a plaintiff ultimately prevails on a claim covered by the policy."[25] "Generally, Texas law only considers the duty-to-indemnify question justiciable after the underlying suit is concluded, unless the same reasons that negate the duty to defend likewise negate any possibility the insurer will ever have a duty to indemnify."[26] Because we hold that Penn-America has a duty to defend Tarango, we also hold that it was premature for the district court to decide the indemnity issue.

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[24] To the extent Penn-America's position is that our interpretation of the Parking Exception renders superfluous the Policy's stipulation that "unloading" is an excluded "use," we do not agree. Not every injury that arises out of "unloading" will also arise out of "parking." It is easy to imagine, for example, a case where cargo falls on someone during the unloading process and that has nothing whatsoever to do with parking. In that instance, the Auto Exclusion would apply and the Parking Exception would not.

[25] *Don's Bldg. Supply, Inc. v. OneBeacon Ins. Co.*, 267 S.W.3d 20, 31 n.41 (Tex. 2008) (citation omitted).

[26] *Northfield*, 363 F.3d at 529 (citation, quotations, and emphasis omitted).

IV.

For the reasons above, we REVERSE the district court's judgment declaring that Penn-America has no duty to defend Tarango; we VACATE the district court's judgment declaring that Penn-America has no duty to indemnify Tarango; and we REMAND this matter for further proceedings consistent with this opinion.

REVERSED in part, VACATED in part, and REMANDED.