In The
Court of Appeals
Seventh District of Texas at Amarillo

No. 07-16-00361-CV

JESSE SALINAS, INDIVIDUALLY AND AS NEXT FRIEND OF C.S., A MINOR, APPELLANT

V.

PROGRESSIVE COUNTY MUTUAL INSURANCE COMPANY, APPELLEE

On Appeal from the County Court at Law No. 1
Tarrant County, Texas[1]
Trial Court No. 2015-002097-1, Honorable Don Pierson, Presiding

October 4, 2017

MEMORANDUM OPINION

Before CAMPBELL and PIRTLE and PARKER, JJ.

Appellant Jesse Salinas, individually and as next friend of C.S., a minor, appeals the trial court's entry of summary judgment in favor of appellee Progressive County Mutual Insurance Company. We will affirm.

[1] Pursuant to the Texas Supreme Court's docket equalization efforts, this case was transferred to this Court from the Second Court of Appeals. See Tex. Gov't Code Ann. § 73.001 (West 2013).

Factual and Procedural Background

In August of 2014, C.S. was injured when the vehicle in which he was a passenger collided with a concrete barrier. The vehicle, which was stolen, was driven by Jensen Perez. Neither C.S. nor Perez had the owner's permission to drive, occupy, or otherwise use the vehicle.

After the accident, appellant submitted an Uninsured Motorist ("UM") claim under his insurance policy from Progressive. Progressive denied the claim, citing the following policy exclusion: "Coverage . . . will not apply . . . [t]o bodily injury sustained by you or a relative while using any vehicle, other than a covered auto, without the permission of the owner of the vehicle or the person in lawful possession of the vehicle."

Appellant filed a petition for declaratory judgment, seeking a determination that the UM exclusion did not apply to C.S. because he was not "using" the vehicle, but merely "occupying" it. Progressive sought summary judgment, alleging that C.S.'s status as a passenger constituted "use" of the vehicle. The trial court granted Progressive's summary judgment motion, dismissing appellant's claims with prejudice.

On appeal, appellant raises one issue: whether the trial court erred in granting the motion for summary judgment based on C.S.'s "use" of the vehicle.

Standard of Review

Progressive's motion for summary judgment presented only traditional grounds for summary judgment. *See* TEX. R. CIV. P. 166a(c). Appellate courts review the granting of a motion for summary judgment *de novo*. *See Valence Operating Co. v.*

Dorsett, 164 S.W.3d 656, 661 (Tex. 2005). The movant in a traditional motion for summary judgment, filed pursuant to Rule 166a(c), has the burden of showing that no genuine issue of material fact exists, and that it is entitled to summary judgment as a matter of law. TEX. R. CIV. P. 166a(c); *see Am. Tobacco Co. v. Grinnell*, 951 S.W.2d 420, 425 (Tex. 1997). The trial court must take as true all evidence favorable to the nonmovant and indulge every reasonable inference in favor of the nonmovant. *Am. Tobacco Co.*, 951 S.W.2d at 425.

Analysis

It is undisputed that C.S. is an injured person, that his injuries were caused by an accident, and that the vehicle in which he was riding was not a "covered auto." The only question is whether C.S. was "using" the vehicle at the time of the accident. If C.S. was using the vehicle, the policy exclusion applies and precludes coverage for his injuries.

The policy does not define "using." Appellant argues that the definition of "using" must be ascertained from its relationship to the word "occupying." Appellant correctly notes that, under one exclusion in the policy, coverage is precluded for "bodily injury sustained by any person while *using or occupying* a covered auto . . ." while the exclusion at issue here precludes coverage for "bodily injury sustained by you or a relative while *using* any vehicle . . . ."

The policy defines "occupying" as "in, upon, or getting in, on, out, or off." Appellant contends that, because "occupying" means something different than "using," and because C.S. was undeniably "occupying" the vehicle, C.S. could not have been "using" it. We disagree.

When terms are defined in an insurance policy, those definitions are controlling. *Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 219 (Tex. 2003). If policy terms are not defined, we give them their ordinary and generally accepted meaning. *Harrison v. Great Am. Assur. Co.*, 227 S.W.3d 890, 893 (Tex. App.—Dallas 2007, no pet.).

"Use" and "occupy" are not mutually exclusive. As used in automobile insurance policies, "use" is a "general catchall . . . designed and construed to include all proper uses of the vehicle." *Farmers Ins. Exch. v. Rodriguez*, 366 S.W.3d 216, 226 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). Texas courts broadly define "use" of a motor vehicle in the context of insurance policies. *Mid-Continent Cas. Co. v. Global Enercom Mgmt., Inc.*, 323 S.W.3d 151, 156 (Tex. 2010). "Use" means "to put into action or service; to employ for or apply to a given purpose." *Lyons v. State Farm Lloyds & Nat'l Cas. Co.*, 41 S.W.3d 201, 205 (Tex. App.—Houston [14th Dist.] 2001, pet. denied) (citing *LeLeaux v. Hamshire-Fannett I.S.D.*, 835 S.W.2d 49, 51 (Tex. 1992)).

At the time of the accident, C.S. was not only an occupant, but also a passenger being transported. The employment of a vehicle as a means of transportation, whether as operator or as passenger, is a generally accepted use of a vehicle. C.S.'s status as a passenger[2], alone, constitutes "use" of the vehicle. *See U.S. Fire Ins. Co. v. United Serv. Auto Ass'n*, 772 S.W.2d 218, 221 (Tex. App.—Dallas 1989, writ denied).

[2] Although appellant emphasizes that C.S. did not request the ride and did not "need" to use the vehicle, neither fact diminishes C.S.'s status as a passenger.

Moreover, the Texas Supreme Court in *Mid-Century Ins. Co. of Tex. v. Lindsey*, 997 S.W.2d 153 (Tex. 1999), set out three factors to determine whether an injury arises out of the use of a vehicle for the purposes of auto liability insurance coverage: (1) the accident must have arisen out of the inherent nature of the automobile, as such; (2) the accident must have arisen within the natural territorial limits of an automobile, and the actual use must not have terminated; and (3) the automobile must not merely contribute to cause the condition which produces the injury, but must itself produce the injury. *Id.* at 157.

The accident here satisfies *Lindsey's* three-part test. The accident arose out of the vehicle's "inherent nature" as an automobile, that is, as a means of transportation; C.S. was injured while inside the vehicle (within its "natural territorial limits"); and the injury-producing event was a car wreck. We conclude that C.S. was "using" the vehicle at the time of the accident.

Conclusion

Having overruled appellant's sole issue on appeal, we affirm the trial court's summary judgment.

Judy C. Parker
Justice