

RECENT DEVELOPMENTS

INSURANCE

SPOUSE FALLS WITHIN THE CLASS OF PERSONS STATUTORILY ENTITLED TO REJECT UNINSURED MOTORIST AND PERSONAL INJURY PROTECTION COVERAGE

Old Am. Mut. Fire Ins. Co. v. Sanchez ___ S.W.3d ___ (Tex. 2004).

FACTS: This case was presented on stipulated facts. In 1998, Margarita Sanchez, wife of Zeferino Sanchez, purchased an insurance policy from Old American for two of the couple's vehicles. Ms. Sanchez rejected Uninsured Motorist ("UM") and Personal Injury Protection ("PIP") coverages on the insurance application and Old American never assessed premiums for the coverages. In applying for the policy, Ms. Sanchez affirmed that the rejections of UM and PIP coverages would apply to the 1998 policy and to all future renewals of that policy. Although Ms. Sanchez's name appeared on the 1998 policy application, she was not listed as a "named insured" on the declarations page. The policy, however, defined "you" and "your" (i.e., the insureds under the policy) to include the "named insured" as well as "[t]he spouse if a resident of the same household." The parties stipulated that both Mr. and Ms. Sanchez were insured under the policy. The parties disagreed, however, about the extent of the policy's coverage. Specifically, the parties disputed whether Mr. Sanchez was entitled to UM and PIP benefits to cover damages arising from a 1999 accident where an uninsured motorist struck Mr. Sanchez's truck.

After the accident, Mr. Sanchez filed a claim with Old American for UM and PIP benefits under the policy. Old American filed suit seeking a declaratory judgment absolving it of any obligation to pay those benefits and moved for summary judgment based on, inter-alia, Ms. Sanchez's rejection of UM and PIP coverages. The trial court granted summary judgment for Old American and Mr. Sanchez appealed. The court of appeals reversed the judgment. The Texas Supreme Court granted Old American's petition for review.

HOLDING: Reversed and rendered.

REASONING: The only issue in this case was whether Ms. Sanchez had statutory authority to waive the PIP and UM coverages. Articles 5.06-1(1) and 5.06-3(a) of the Texas Insurance Code mandate UM and PIP coverages in Texas automobile liability insurance policies, unless those coverages are explicitly waived. Article 5.06-1(1) states "The coverages required under this Article shall not be applicable where any insured named in the policy shall reject the coverage in writing; provided that unless the named insured thereafter requests such coverage in writing, such coverage need not be provided in or supplemental to a renewal policy where the named insured has rejected the coverage in connection with a policy previously issued to him by the same insurer or by an affiliated insurer." The court determined that the phrase "insured named in the policy" was synonymous with "named insured" in this context.

The Texas Department of Insurance (formerly the "State Board of Insurance") is charged with adopting standard

policy forms to be used by motor vehicle insurers. With certain exceptions inapplicable to this case, insurers can only use a policy form adopted by the Texas Department of Insurance. The standard automobile insurance policy form in use when the Legislature enacted Articles 5.06-1 and 5.06-3 was the Texas Family Automobile Policy ("TFAP"). The TFAP explicitly defines "named insured" to include both the individual named on the declarations page "and ... [that individual's] spouse, if a resident of the same household." Thus, when the Legislature chose the phrase "named insured," it must have understood it to include the named insured's resident spouse, even if he or she was not specifically listed in the declarations page of the policy. Ms. Sanchez was, therefore, a "named insured" and an "insured named in the policy" as contemplated by the Legislature when enacting articles 5.06-1(1) and 5.06-3(a). The court held that Ms. Sanchez had statutory authority to reject UM and PIP coverages in this case.

CERTIFIED QUESTION: DOES TEXAS PUBLIC POLICY PROHIBIT A LIABILITY INSURANCE PROVIDER FROM INDEMNIFYING AN AWARD FOR PUNITIVE DAMAGES IMPOSED ON ITS INSURED BECAUSE OF GROSS NEGLIGENCE

Fairfield Ins. Co. v. Stephens Martin Paving, LP, 381 F.3d 435 (5th Cir. 2004).

FACTS: In late 2002, Plaintiff, Roy Bennett, an employee of Stephens Martin Paving ("Stephens") was killed when the broom machine he was operating overturned. His wife filed suit against Stephens claiming gross negligence and requested punitive damages only. Stephens in response to this suit requested that its insurance carrier, Fairfield Insurance ("Fairfield"), defend against the claim.

Fairfield initially defended the claim, but reserved the right to deny indemnification of Stephens and to pay costs of the defense. Fairfield then filed suit in federal district court for declaratory judgment on the grounds that it had no duty to defend or indemnify Stephens. Fairfield moved for summary judgment and argued that Texas public policy precluded indemnification for punitive damage awards. This argument was rejected by the district court and the motion was rejected. The court felt that there was a duty to defend as well as indemnify against punitive damages awarded. Fairfield appealed.

HOLDING: Certified to the Texas Supreme Court.

REASONING: The Fifth Circuit Court of Appeals declined to make a decision in this matter and instead certified the question to the Texas Supreme Court because the question involved an important question of state law, which Texas has not resolved. The Court pointed out in *Ridgway v. Gulf Life Ins. Co.*, 578 F.2d 1026 (5th Cir. 1978), the Court found that Texas public policy did not bar indemnification of punitive damage awards. Texas intermediate courts have substantially undermined this decision by disagreeing with the ruling, and instead basing their decisions on the Texas Supreme Court decision in *Transportation Ins. Co.*

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v. Moriel, 879 S.W.2d 10 (Tex. 1994).

The issue whether punitive damage awards are insurable under public policy is an important one for Texas courts. Rulings on this issue have differed and there has been no specific guidance, so the Court of Appeals certified this issue to the Texas Supreme Court for its ultimate decision.

THERE CAN BE NO PENALTY UNDER ARTICLE 21.55 FOR AMOUNT TENDERED UNCONDITIONALLY IN PARTIAL SETTLEMENT

PLAIN LANGUAGE OF THE POLICY NEITHER RESTRICTED, NOR REQUIRED INSURER TO PAY FOR THE COST TO REPLACE THE ROOF WITH AN IDENTICAL ONE

Republic Underwriters Ins. Co. v. Mex-Tex, Inc., ____ S.W.2d ____ (Tex. 2004).

FACTS: Following a May 25, 1999 hail storm in Amarillo, Mex-Tex, Inc. notified its property insurer, Republic Underwriters Insurance Co., (“Republic”) of damage incurred to the roof of Signature Mall, a retail shopping center that Mex-Tex owned. Mex-Tex claimed that the roof had been destroyed and needed to be replaced. While Republic was still investigating the claim it learned that Mex-Tex had retained a contractor to replace the roof at a cost of \$179,000. Republic sent Mex-Tex a check on August 20, 1999 for \$145,460, an amount representing what Republic’s engineer had determined was the cost of replacing the mall’s roof with an identical one. Mex-Tex returned the check. Republic re-sent the check and Mex-Tex again returned it. Republic then replied that it would hold the money until Mex-Tex accepted it, which Mex-Tex did on October 12, 2000 as a partial payment of its claim.

Mex-Tex sued Republic for breach of the policy and for delay penalties under Article 21.55. After a bench trial, the court found that Republic’s failure to pay Mex-Tex the \$179,000 was a breach of Republic’s policy obligation to replace the roof with one of “like kind and quality.” The court awarded \$33,540 in damages, the difference between the price of the new roof and the amount of the check. The court also awarded Mex-Tex, under Article 21.55, 18% per annum on the \$179,000. The Court of Appeals affirmed. Republic appealed.

HOLDING: Reversed and remanded.

REASONING: Republic’s policy provided that in the event of loss it would rebuild or replace the property with other property of like kind and quality; and that it was required to pay only the cost of replacing the damaged property with property of comparable material and quality. Republic argued that it did not breach the policy by offering to replace Mex-Tex’s roof with an identical one and refusing to pay for a more expensive one. The trial court held that comparable does not

mean identical, and found that the roof Mex-Tex installed was comparable to the one it replaced, differing only in the way it was attached to the building. The plain language of the policy neither restricted nor required Republic to pay for the cost to replace the roof with an identical one. The policy clearly allowed more leeway than that. However, there was evidence to support the court’s finding that Mex-Tex’s new roof was within that leeway. Mex-Tex’s roofing contractor and its expert at trial both testified that the old and new roofs were comparable. The only evidence to the contrary was the difference in cost. In these circumstances, the trial court could find that Republic breached the policy by refusing to pay the cost of the new roof.

Republic rightfully argued that the delay penalty imposed by Article 21.55 should have been calculated only on the \$33,450 difference between the payment it tendered Mex-Tex and the full amount Mex-Tex claimed. Article 21.55, section 3(f) states that if an insurer delays payment of a claim, the insurer shall pay damages and other items as provided for in Section 6 of this article. Section 6 states the insurer is liable to pay 18 percent per annum of the amount of such claim as damages. Article 21.55 1(3) states that claim means a first party claim made by an insured or a policyholder that must be paid by the insurer directly to the insured or beneficiary. Thus, the claim amount is limited to the amount determined to be owed, which would be net of any partial payments already made.

The trial court held that comparable does not mean identical, and found that the roof Mex-Tex installed was comparable to the one it replaced, differing only in the way it was attached to the building.

Mex-Tex rightfully argued that the penalty should nevertheless be assessed if an insurer’s tender of partial payment of a claim is not unconditional. The trial court found that Republic did not tender \$145,460 unconditionally but tried to enforce a full and final release of the claim when only a partial payment had been made. However, there was no evidence of any clear intent by Republic to condition its tender on a full release of Mex-Tex’s claim. The burden was on Mex-Tex to prove that Republic’s offer was conditioned on a full release. The evidence Mex-Tex cited fell far short of this standard. Mex-Tex proved only that the penalty should have been awarded on \$33,540 from the time that amount should have been paid until judgment. In sum, Mex-Tex was entitled only the statutory penalty of the \$33,540 difference between the tendered payment of \$145,460 and the amount of Mex-Tex’s claim of \$179,000.