AETNA CASUALTY AND SURETY COMPANY, Appellant v. VINO NARAN, Appellee

No. 05-96-01486-CV

COURT OF APPEALS OF TEXAS, FIFTH DISTRICT, DALLAS

1999 Tex. App. LEXIS 843

February 10, 1999, Opinion Filed

NOTICE: **[*1]** PURSUANT TO THE TEXAS RULES OF APPELLATE PROCEDURE, UNPUBLISHED OPINIONS SHALL NOT BE CITED AS AUTHORITY BY COUNSEL OR BY A COURT.

SUBSEQUENT HISTORY: Motion for Rehearing of Petition for Review Overruled December 2, 1999.

PRIOR HISTORY: On Appeal from the 192nd Judicial District Court. Dallas County, Texas. Trial Court Cause No. 92-11219-K.

DISPOSITION: REVERSED and RENDERED.

JUDGES: Before Justices Maloney, Whittington, and Roach. Opinion By Justice Roach.

OPINION BY: JOHN R. ROACH

OPINION

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This appeal involves a claim for coverage brought by Vino Naran under several general liability insurance policies issued by Aetna Casualty and Surety Company to Village Imports, Inc. Aetna brings three points of error asserting the trial court erred in granting partial summary judgment to Naran and in denying Aetna's motion for summary judgment. Because we conclude that Aetna conclusively proved its entitlement to summary judgment and Naran did not, we reverse the trial court's judgment and render judgment in Aetna's favor that Naran take nothing on his petition.

FACTUAL BACKGROUND

The present controversy arises out of a suit filed by Naran against Steve Leff d/b/a Leff Bros. Automotive and Village Imports, Inc. On July 28, 1986, Naran's home, garage, and two cars **[*2]** were destroyed by fire. Investigators attributed the cause of the fire to a catalytic converter installed on Naran's 1984 Mercedes. Leff Bros. Automotive, a franchisee of Village Imports, installed the catalytic converter on Naran's car. Naran sued Village Imports and Leff Bros. Automotive asserting claims for negligent installation, breach of warranty, and violations of the Texas Deceptive Trade Practices Act (DTPA).

Village Imports forwarded a copy of Naran's lawsuit to its insurance agency, Collier Cobb & Associates. Village Imports had purchased several Aetna insurance policies including:

> (1) Garage Keepers Liability Policy No. 25 FX 237035 CCA, policy period from June 4, 1984 through June 4, 1985;
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> (2) Garage Keepers Liability Policy No. 25 FX 244465 CCA, policy period from June 4, 1985 through June 4, 1986;

(3) Deluxe Business Owners Liability Policy No. 025 JS 001165182 FCA, policy period June 18, 1984 through June 18, 1986; and

(4) Special Multi-Peril Liability Policy No. 25 SM 979849 FCA, policy period from June 18, 1985 through June 18, 1986.

A Collier Cobb agent prepared a notice of loss and forwarded it along with a copy of Naran's **[*3]** lawsuit to Aetna. The notice of loss incorrectly listed the date of loss as July 28, 1985 instead of July 28, 1986.

Aetna assigned a claims representative to the case. Based on the incorrect notice of loss, the claims representative believed the date of loss fell within the policy period of some of the above Aetna policies and therefore hired an attorney to represent Village Imports in the lawsuit. On October 28, 1988, about one month after the claims representative received the notice of loss and the attorney filed an answer on behalf of Village Imports, the claims representative realized that the fire occurred on July 28, 1986.

The record is unclear when Aetna advised Village Imports that it would not continue to provide coverage for Naran's lawsuit. However, on January 24, 1989 Village Imports's president sent a letter to the attorney hired by Aetna authorizing the attorney to withdraw as Village Imports's counsel in the Naran suit. The trial court granted the attorney's motion to withdraw in an order signed on March 8, 1989.

Ten months later, on January 15, 1990, Naran filed a motion to compel Village Imports to answer interrogatories and respond to Naran's requests for production. **[*4]** The trial court granted the motion, but Village Imports did not provide the discovery ordered by the trial court. Consequently, the trial court granted Naran's later motion for sanctions, struck Village Imports's pleadings and deemed all allegations in Naran's original petition true except for the amount of damages. Following a proof hearing on damages, judgment was entered against Village Imports for a total of $ 1,790,867.90.

Naran, as judgment creditor, filed the present lawsuit against Aetna seeking, among other things, a declaration that Aetna's policies covered his claim and that Aetna was therefore liable for the resulting judgment. Village Imports, as an insured under the Aetna policies, intervened in Naran's lawsuit. Village Imports and Naran separately moved for partial summary judgment asserting that Aetna was required to provide coverage under the policies and must be held liable for the resulting damages because: (1) Aetna was estopped from denying coverage once it unconditionally assumed the defense of Village Imports; (2) Naran's breach of warranty claims accrued and, therefore, triggered coverage under the policies when the Mercedes was delivered to Naran; (3) **[*5]** Aetna did not send proper notice of nonrenewal on the policies; and (4) there was an accident or occurrence triggering coverage within some of the policy periods. In contrast, Aetna moved for summary judgment claiming there was no coverage because, among other things: (1) the only property damage complained of in the underlying suit resulted from the fire which occurred after all of the Aetna policies had expired; (2) Village Imports paid no renewal premiums for the policies it claims were renewed; (3) Aetna assumed Village Imports's defense in the Naran lawsuit without actual knowledge that the fire occurred outside the policy coverage periods; and (4) even assuming Naran's claim fell within the policy periods, it would have been excluded from coverage under several of the policies.

The trial court granted Naran's motion for partial summary judgment without specifying the grounds upon which it relied. Village Imports's motion for partial summary judgment was also granted to the extent that it sought a determination of Aetna's duty to indemnify Village Imports for the judgment in the underlying lawsuit. The trial court denied Aetna's motion for summary judgment. Village Imports settled **[*6]** with Aetna and its claims under the Texas Insurance Code and the Texas Deceptive Trade Practice Act were dismissed. [1] Naran moved for and was granted a nonsuit with regard to his remaining claims. Naran and Aetna later agreed to the amount of attorney's fees to be included in Naran's award and a final judgment was signed on July 17, 1996. Aetna perfected this appeal.

1 The final judgment indicates that Village Imports's remaining claims have been turned over to Naran.

SUMMARY JUDGMENT

In its first and second points of error, Aetna challenges the partial summary judgments in favor of Naran and Village Imports and the denial of its motion for summary judgment. To prevail on summary judgment, a plaintiff must conclusively establish all elements of its cause of action as matter of law. *Swilley v. Hughes, 488 S.W.2d 64, 67 (Tex. 1972)*; *TEX. R. CIV. P. 166a(c)*. A matter is conclusively established if ordinary minds could not differ as to the conclusion to be drawn from the evidence. *Triton Oil & Gas Corp.* **[*7]** *v. Marine Contractors & Supply, Inc., 644 S.W.2d 443, 446 (Tex. 1982)*. Because the trial court did not specify the grounds on which it granted summary judgments to Naran and Village Imports, Aetna must negate all of the grounds

raised below to warrant reversal. *See State Farm Fire & Cas. Co. v. S.S., 858 S.W.2d 374, 381 (Tex. 1993)*. When, as here, one party's motion for summary judgment is granted and the other party's motion is denied, we determine all questions presented to the trial court, including whether the losing party's motion should have been denied. *See Jones v. Strauss, 745 S.W.2d 898, 900 (Tex. 1988)*. We may reverse and render judgment for the other movant if that is the judgment the trial court should have rendered. *See id*. As the plaintiff in the lawsuit against Aetna, Naran had the burden of proving that the damages occurred during at least one of the above policy periods. *Employers Cas. Co. v. Block, 744 S.W.2d 940, 944 (Tex. 1988)*(*overruled on other grounds by State Farm Fire & Cas. v. Gandy, 925 S.W.2d 696 (Tex. 1996)*)("the time of damage is a precondition to any coverage rather than an exception to general coverage").

Initially, Aetna asserts **[*8]** there was no occurrence under the policies because property damage did not manifest itself until the fire and the fire occurred outside the policy periods. [2] On the other hand, Naran argues that, even though the fire occurred after the policies expired, certain events occurred within the policy periods that triggered coverage under the policies and provide coverage for the fire damage. In particular, he contends that an accident or occurrence took place as early as March 1985, when Naran began to drive his Mercedes with the allegedly improperly installed catalytic converter. Specifically, Naran refers to a heating process known as pyrolysis. Naran relied on affidavits from two expert witnesses who explained that as the heat from the catalytic converter removed the moisture from the car's carpet, the ignition temperature of the carpet was lowered until it was reduced to a point that the carpet ignited from the heat of the catalytic converter. Both experts concluded that this heating process was a continuous process of damage to Mr. Naran's vehicle which ultimately resulted in the fire. Before addressing the merits of Naran's argument, we are initially faced with the question of which **[*9]** coverage trigger theory to apply.

2 On appeal, Aetna also challenges the summary judgment on Naran's ground that the date of the breach of warranty constituted an "accident" or "occurrence" to trigger coverage under the above policies. Naran does not address this ground on appeal. Naran presented no authority to the trial court, nor have we found any, to support this assertion. In his summary judgment brief, Naran simply relied on cases holding that a cause of action for breach of warranty accrues on the date of tender of delivery. *See Garcia v. Texas Instruments, Inc., 610 S.W.2d 456 (Tex. 1980)*; *Cornerstones Mun. Util. Dist. v. Monsanto Co., 889 S.W.2d 570* (Tex. App.--Houston [14th Dist.] 1994, writ denied). Because the above definitions of occurrence and accident require some property damage during the policy period, we conclude that summary judgment could not have been granted on this ground.

All of Aetna's liability policies provided coverage for an "accident" or "occurrence" resulting in "property **[*10]** damage" during the policy period. Both garage policies define "accident" as including "continuous or repeated exposure to the same conditions resulting in bodily injury or property damage the insured neither expected nor intended." "Property damage" under the garage policies means "damage to or loss of use of tangible property." Likewise, the Deluxe Business Owner's Policy and the Multi-Peril Policy define occurrence as an "accident, including continuous or repeated exposure to conditions, which results in bodily injury or property damage neither expected nor intended from the standpoint of the insured." Under those policies, "property damage" means "(1) physical injury to or destruction of tangible property which occurs during the policy period, including the loss of use thereof at any time resulting therefrom, or (2) loss of use of tangible property which has not been physically injured or destroyed provided such loss of use is caused by an occurrence during the policy period."

Naran argues that the relevant inquiry should not be when the property damage manifested itself because the property damage sustained in this case resulted from a continuous process and involved a continuing **[*11]** injury that occurred prior to the fire in July 28, 1986. Naran suggests instead that we adopt an exposure theory which would trigger coverage under the policies the first time his property was exposed to the harm, i.e. the heat from the allegedly negligently installed catalytic converter. Alternatively, he urges us to apply a continuous trigger theory. Thus we must initially determine which coverage trigger theory applies in this case.

Although it is true that the Texas Supreme Court has never directly addressed the coverage trigger issue, the only theory ever applied in Texas has been the manifestation theory. *See State Farm Mut. Auto Ins. Co. v. Kelly, 945 S.W.2d 905, 910* (Tex. App.--Austin 1997, writ denied); *Dorchester Dev. Corp. v. Safeco Ins. Co., 737 S.W.2d 380, 383* (Tex. App.--Dallas 1987, no writ); *Cullen/Frost Bank v. Commonwealth Lloyd's Ins. Co., 852 S.W.2d 252, 257* (Tex. App.--Dallas 1993, writ denied). Accordingly, we conclude that the rule announced in *Dorchester* is dispositive here.

In *Dorchester,* the court addressed the question of whether there is coverage for property damage caused by workmanship performed during the policy period when the **[*12]** property damage is not manifested until after

the policy period. *Dorchester, 737 S.W.2d at 383*. The *Dorchester* court concluded there was no coverage unless an identifiable damage or injury, other than causative negligence, took place during the policy period. *Id*. Liability arises under a policy only if property damage manifests itself or becomes apparent during the policy period. *Id*. Because the facts of this case fit squarely within *Dorchester*, we apply the rule announced in that case.

In concluding the manifestation theory controls in this case, we necessarily reject the applicability of other trigger theories presented by Naran. We are unpersuaded by Naran's urging to adopt an exposure or injury in fact trigger theory in this instance. The exposure theory holds coverage is triggered when the claimant or his property is first exposed to the injury causing agent and on each subsequent exposure to the injury causing agent. *See, e.g., Clemtex, Inc. v. Southeastern Fidelity Ins. Co., 807 F.2d 1271, 1273 (5th Cir. 1987)*; *Morrisville Water & Light Dept. v. U.S. Fidelity & Guar. Co., 775 F. Supp. 718, 730 (D.C.Vt. 1991)*. In support of this position, Naran relies **[*13]** on federal authority and authority from other states. These cases typically involve claimants suffering from continuous exposure to asbestos and pollutants or toxins causing environmental contamination which cause latent disease or damage and not the type of property damage involved in the present case. We discern no reason to depart in this instance from the manifestation theory previously espoused in *Dorchester*.

Naran also relies on the continuous injury theory to support his argument that his loss is covered under the above policies. Naran again cites cases from other jurisdictions and also relies on this Court's decision in *Cullen/Frost Bank, 852 S.W.2d at 257*. We do not read *Cullen/Frost* as holding that continued and repeated exposure to a condition relieves a party from proving that property damage manifested during the policy period. To the contrary, *Cullen/Bank* cited *Dorchester's* manifestation theory with approval and merely held that "in cases involving continuous or repeated exposure to a condition, there can be more than one manifestation of damage and hence an occurrence under more than one policy." *Id*. Accordingly, even if we accept Naran's contention **[*14]** that pyrolysis constituted a continuing injury that began when Naran first drove his car with the negligently installed catalytic converter, Naran would still be required to prove that damage resulting from the pyrolysis manifested itself during the policy period.

Having determined that *Dorchester* controls the disposition of the coverage trigger issue, we now turn to the summary judgment evidence presented to the trial court. It is undisputed that the fire which destroyed Naran's possessions occurred after the effective dates of each of the policies. The question therefore becomes whether Naran has conclusively established that property damage manifested itself during any policy period. Naran's own experts characterize pyrolysis as the process that caused the fire. While both of those experts conclude that pyrolysis was in itself property damage, their characterization of pyrolysis as a heating process that simply lowered the moisture content in the Mercedes carpeting belies this conclusion. There is no evidence in the record that this loss of moisture to the carpet in and of itself constituted property damage. In any event, Naran is not seeking recovery for the loss of moisture **[*15]** to his car's carpeting but for the damage caused by the fire. Regardless, even if we were to indulge Naran's argument that the pyrolysis does in fact constitute property damage, the record is absolutely devoid of any evidence that this property damage became apparent or manifested during the policy periods. Our review of the record reveals no discernable injury until the fire. Because Naran failed to show that property damage manifested itself during the policy period, he was not entitled to summary judgment on this issue. Conversely, the summary judgment evidence conclusively established that all of the physical injury or damage to Naran's property manifested itself at the time of the fire, after the policies had expired. Consequently, the trial court could not have properly granted summary judgment in favor of Naran unless one of his remaining theories involving (1) automatic renewal or (2) estoppel is correct.

Aetna next argues that all of the liability policies lapsed before the fire and Naran's assertion that the policies automatically renewed for another policy term as matter of law is without merit. We agree with Aetna.

In support of his summary judgment motion, Naran argued **[*16]** that because Aetna failed to send Village Imports nonrenewal notices before the policies' initial expiration dates, coverage automatically continued and was in effect on the date of the fire. We first address the automatic renewal argument with respect to the second garage keeper's policy covering the period from June 4, 1985 through June 4, 1986. This is the only policy of the four at issue which contained a nonrenewal notice provision. It required Aetna to notify Village Imports sixty days before the policy's expiration if Aetna intended not to renew the policy.

The declaration sheets in this case indicate that all of the above policies had expired by their own terms. There is no evidence in the record that the policies were continued. As the underlying plaintiff and party moving for summary judgment, Naran had the burden of producing evidence that his loss was covered because the policies were renewed. The only evidence Naran presented on this issue was Aetna's purported failure to send the requisite nonrenewal notice to Village Imports. Absent a specific provision in the policy, we do not see how this

failure automatically renewed the garage policy as a matter of law.

In **[*17]** support of his motion for summary judgment, Naran also relied on a regulation promulgated by the Texas Board of Insurance in 1972 providing "policies must be renewed, at the option of the policy holder, unless the company has mailed written notice to the policy holder of its intention to decline renewal at least thirty days in advance of the policy expiration date." [3] We do not find that this regulation supports Naran's contention of automatic renewal. On the contrary, section 12 of the 1972 Board Order entitled "Violations" specifically provides that policies on which notice of nonrenewal is not given shall be renewed *at the request of the insured*. *See* Board Order 48578, Texas State Board of Insurance (January 14, 1972)(emphasis added). When read in its entirety and in conjunction with other sections of the Board Order, we conclude that the thirty-day notice requirement merely ensures policyholders receive advance notice when the insurer intends not to renew coverage. An insurer therefore loses its option not to renew coverage if it fails to provide the requisite notice. The policy does not, however, automatically renew upon the failure to issue the thirty day notice. Instead, **[*18]** the option whether or not to renew the policy lies with the insured. As provided in section 12 of the Board Order, the insured must request renewal in order to continue coverage. In this case there is absolutely no evidence that Village Imports ever requested that any of the Aetna policies be renewed for another policy period. There is also nothing to suggest that Village Imports paid or attempted to pay the premiums for the policy renewals. Absent such evidence, we conclude that the policies were not renewed for another policy term. Instead, the policies lapsed by their own terms before the fire.

3 On appeal, Naran also relies on a March 27, 1986 insurance regulation requiring the insured to provide notice of nonrenewal 45 days before the policy expired. Because Naran did not rely on this regulation at the time of summary judgment, he has waived his right to rely on the same on appeal. *See TEX. R. CIV. P. 166a(c)*. In any event, our analysis with respect to the 1972 insurance regulation is equally applicable to the 1986 regulation.

[*19] Finally, Aetna contends that it was not estopped from denying coverage in this case merely because it assumed Village Imports's defense without declaring a reservation of rights or obtaining a nonwaiver agreement. [4] We agree.

4 On appeal both Aetna and Naran also address the issue of whether Aetna waived its noncoverage defenses. However, the record below indicates that Naran did not raise this as a specific ground for summary judgment. Accordingly, the issue has been waived on appeal. See *TEX. R. CIV. P. 166a(c)*. Even assuming this issue was properly preserved for review, we conclude that Naran was not entitled to summary judgment on this basis for the same reasons expressed with respect to the estoppel argument.

In support of his estoppel argument to the trial court, Naran relied primarily on *Farmers Texas County Mutual Insurance Company v. Wilkinson, 601 S.W.2d 520* (Tex. Civ. App.--Austin 1980, writ ref'd n.r.e.). In *Wilkinson*, the Austin court fashioned a narrow exception to the general principle **[*20]** that the doctrine of estoppel cannot create coverage where none exists under the policy. *See 601 S.W.2d at 521-22*. The court ruled that an insurer may be estopped from raising noncoverage defenses, if, with knowledge of the facts indicating noncoverage, it assumes an insured's defense without obtaining a reservation of rights or a nonwaiver agreement. *Id*. The court noted the rationale behind this rule is the potential conflict of interest between the insured and insurer when the insurer defends the insured in a lawsuit and at the same time formulates its defense against the insured for noncoverage. *Id. at 522*. For the reasons that follow, we conclude the *Wilkinson* exception does not apply.

Initially, we note that the factual circumstances in the present case are quite different from those in *Wilkinson*. In *Wilkinson*, the insurer managed the claim on behalf of Wilkinson for over four years before filing a declaratory judgment raising the coverage issue. *Id. at 521*. After the declaratory judgment action was filed, the insurer retained an attorney to represent Wilkinson in the underlying litigation. *Id*. Because the insurer had not effectively reserved its rights **[*21]** under the policy, the court concluded that it was required to provide coverage. *Id. at 522*.

In this case, the record reflects that, unlike the insurer in *Wilkinson*, the parties stipulated that the Aetna claims representative first became aware of the actual date of the fire one month after the attorney it hired had filed an answer on Village imports's behalf. About three months later, Village Imports wrote a letter to the defense attorney hired by Aetna permitting him to withdraw from the case. Defense counsel's motion was granted about two months after the letter. Unlike the *Wilkinson* case, a reservation of rights letter would have been inappropriate in these circumstances because the record reflects Aetna had no intention of continuing to defend Village Imports after it became aware of the coverage issue. The delay in Aetna's withdrawal appears to result from Aetna's attempt to determine whether any other insurer might provide coverage so that a new at-

torney could be substituted for the one hired by Aetna. Once Aetna determined that there was no other applicable insurance, it withdrew its defense. Naran's suit against Village Imports proceeded, and Village Imports did **[*22]** not retain another attorney to enter an appearance in the case. Because the facts of this case are distinguishable from those in *Wilkinson*, we do not find that case controlling.

Even if we indulge Naran's argument that the *Wilkinson* exception should apply in this case, Naran has failed to put forth any evidence demonstrating that Village Imports was prejudiced by Aetna's failure to reserve its rights regarding potential coverage defenses before withdrawing its defense. This Court recently addressed the *Wilkinson* exception in *State Farm Lloyds, Inc. v. Williams, 960 S.W.2d 781* (Tex. App.--Dallas 1997, writ dism'd by agr.)(op. on reh'g). There we concluded that to prevail on an estoppel theory under *Wilkinson*, the insured must show he was prejudiced by the insurer's conduct. *See id. at 785*. In *Williams*, this Court concluded that assuming of the insured's defense without advising of the potential coverage defenses deprived the insured the option to reject the insurer's defense, retain private counsel, and to accept the plaintiff's $ 600,000 settlement offer which was later determined to be within the determined policy limits. Instead, the insurer's action **[*23]** resulted in judgment against the insured for over $ 25,000,000. Naran claims that Village Imports was harmed by Aetna's defense because Aetna failed to file a special appearance in the underlying litigation, failed to hire experts, and failed to conduct and answer discovery. In support of these claims of harm, Naran relies on his attorney's affidavit and the affidavit of attorney Brent Cooper. However, these affidavits do not indicate how the outcome of the litigation against Village Imports would have been any different had Aetna not withdrawn its defense or if Aetna had sent a reservation of rights letter once it gained knowledge of the coverage issue. Without any evidence to support his claim of prejudice, Naran could not prevail on his claim of estoppel.

In conclusion, because we determine that Naran failed to conclusively establish his entitlement to summary judgment and Aetna has demonstrated its entitlement to summary judgment as a matter of law, we sustain Aetna's first and second points of error. Our disposition of Aetna's first and second points of error make it unnecessary to address the third point of error.

The trial court's judgment is reversed. We render judgment **[*24]** in favor of Aetna that

Naran take nothing on his petition.

JOHN R. ROACH

JUSTICE