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Supreme Court of Texas.
Greg Tanner and Maribel Tanner, individually and as next friends of
K.T. and
R.T., Minor Children, Petitioners,
v.
Nationwide Mutual Fire Insurance Company, Respondent.
No. 07-0760.

October 14, 2008.

Appearances:
Don R. Cotton, The Bob Richardson Law Firm, Austin, TX, for
petitioner.
L. Chris Heinemeyer, Krenek & Heinemeyer, Professional
Corporation, San Antonio, Texas, for respondent.

Before:

Wallace B. Jefferson, Chief Justice; Nathan L. Hecht , Harriet
O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W.
Green, Phil Johnson, and Don R. Willett, Justices

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CHIEF JUSTICE JEFFERSON: Be seated. The Court is now ready to hear
argument in 07-0760, Greg Tanner and Maribel Tanner and others versus
Nationwide Mutual Fire Insurance Company.

COURT ATTENDANT: May it please the Court. Mr. Cotton will present
argument for the petitioners. Petitioners have reserved five minutes
for rebuttal.

ORAL ARGUMENT OF DON R. COTTON ON BEHALF OF THE PETITIONER

MR. COTTON: May it please the Court. Good morning, My name is Don
Cotton. I represent the Tanner family. As you know, this dispute that
is before you today, arose out of a car wreck that occurred in rural
Caldwell County. My clients, the Tanners, were on a family outing and
were traveling on Old Bastrop Road, east of the City of San Marcos.
Unbeknownst to them earlier in the day, a Nationwide insured named
Richard Gibbons had been stopped by the DPS on I35. Mr. Gibbons decided
to flee that traffic stop and was initially pursued by DPS. The DPS
officers lost the pursuit essentially, gave up on the pursuit and Mr.
Gibbon-- Mr. Gibbons was subsequently picked up by San Marcos PD. The
San Marcos Police Department Officers pursued Mr. Gibbons through the

City of San Marcos, the residential neighborhood, there was testimony that this was a long and involved pursuit that lasted for quite a bit of time.

Eventually, the pursuit left the City of San Marcos and went into the rural areas of Caldwell County where the Tanner family was traveling. The testimony at trial from the officers involved indicated that as Mr. Gibbons, in his pickup truck, approached the intersection with Highway 80 and Old Bastrop Road, that he applied his breaks in attempt to avoid a collision with the Tanner family but was unable to do so and there was a severe collision at that intersection. Mr. Tanner's ...

JUSTICE GREEN: What, what-- why would any insurance company ...

MR. COTTON: I'm sorry.

JUSTICE GREEN: Why would any insurance company intend to insure that kind of conduct?

MR. COTTON: Well, what the insurance company is insuring is damages caused by their insurer for any reason unless it fits one of the exclusions within that on policy.

JUSTICE BRISTER: Okay. But we don't want them to insure people to do stuff like this.

MR. COTTON: What we don't want them to do is to insure people who do things like the Finkley case, the Ohio case that Nationwide relies on, and there's a difference between that case and what happened in this case. What happened in this case, is that an earlier chase that had been extraordinarily reckless and had involved dangerous behavior that perhaps would have given rise to the facts needed that entitled them to the exclusion in the policy. That part of the chase was over. What happened that caused the collision in which the Tanners were involved was much later. And the testimony from Officer Arredondo, the San Marcos Police Department officer, who was immediately behind this vehicle is that the collision occurred in an open intersection in rural Caldwell County surrounded by cornfields.

JUSTICE WILLETT: Is there any dashboard camera -

MR. COTTON: There, there was not -

JUSTICE WILLETT: - that in the record?

MR. COTTON: - there's none that was ever determined.

JUSTICE WILLETT: On either the DPS side or the local police side?

MR. COTTON: None was produced at trial. We don't have it as part of the record. If there is any, we're not aware of it.

JUSTICE MEDINA: When, when is a chase not reckless?

MR. COTTON: Well, ...

JUSTICE MEDINA: You're saying this, that the incidence of this accident, this was not reckless?

MR. COTTON: A couple of things. First of all, the test is not reckless. The test is intentional. Ah this is an intentional acts exclusion and the policy at issue is an Ohio insurance policy that has a slightly broader definition of intentional than what we have in the standard Texas policy. The Ohio policy at issue defines the exclusion by saying that, "Coverage does not apply to property damage or bodily injury caused intentionally ..."

JUSTICE BRISTER: Let's, let's come back to that. His question was, what, what is-- this is nothing but reckless criminal conduct.

MR. COTTON: Well, I agree that eluding police is certainly criminal conduct, but there's no exclusion ...

JUSTICE BRISTER: How about driving a hundred down city streets and highways?

MR. COTTON: And, and I would agree with the Court if the collision

...

JUSTICE BRISTER: How about running stop signs in the middle of the night? How about everything this guy did?

MR. COTTON: And I would agree with the Court that if the collision happened during the commission of those acts, it, it very well may be.

JUSTICE BRISTER: But what had, had the clock struck 12 and he's turned into a pumpkin that all of a sudden, when your clients drove by, he was no longer in a, a bad guy? No longer in a police chase?

MR. COTTON: Well, your Honor, respectfully, the insurance exclusion doesn't exclude coverage of bad guys. The insurance exclusion excludes coverage for a very narrow specific effects.

JUSTICE WILLETT: But how was eluding police not intentional and willful? His decision to flee was intentional and willful, wasn't it?

MR. COTTON: Of course, it was. But the-- there's two things involved here. Number 1, that decision to flee the police, that intentional decision to flee the police had been made much earlier in the day. But secondly and more importantly, there is affirmative evidence in the record that he was attempting to avoid the collision. It-- it's nonsensical to say that someone intentionally caused harm when the only evidence in the record is that they tried to avoid causing that harm.

JUSTICE BRISTER: But he was still trying to get away?

MR. COTTON: Of course, he's trying to flee the police.

JUSTICE BRISTER: And, and if he runs into somebody disabling his vehicle, he aint going to get away. So he might have been doing this in all probability, not because he valued human life because he was trying to get away as he'd been trying to do for a long time.

MR. COTTON: And, and I want to make one thing perfectly clear. I am not here to defend Richard Gibbons.

JUSTICE BRISTER: I know and I'm, I'm-- I understand that but I'm-- but we-- I mean, that's-- I'm, I'm trying to te-- tell me what your version of what happened is? Sounds like you're saying, "This was another guy, this was a week later and --"

MR. COTTON: No.

JUSTICE BRISTER: - describing a grocery store. What, what ...

JUSTICE JOHNSON: [inaudible] Before you go to that, let me ask you a question. Was there any objection to the way this was submitted to the jury?

MR. COTTON: There was not. The ...

JUSTICE JOHNSON: And that-- The reason I'm asking that is because the question seems to ask, "Was the bodily injury to your clients caused intentionally?"

MR. COTTON: And that's right. And that's because it's tracking the language of the policy -

JUSTICE JOHNSON: Okay.

MR. COTTON: - and that's-- what I think I'm inartfully the point I'm trying to make here.

JUSTICE JOHNSON: And I didn't mean to interrupt you. You might go back to Justice Brister's question.

MR. COTTON: Well, and the point is, we don't have in the law or nor do we want to have as a matter of public policy, a rule that says, "Insurance companies don't have to provide coverage if their insured is a bad guy." And we don't have a rule that says, "Insurance companies don't have to provide coverage if their insured hurts someone while he's doing a bad thing." What we have in this case is a very ...

JUSTICE BRISTER: But we want a, we want a rule that doesn't-- that tells insureds, don't go out and recklessly endanger people's lives or

intentionally endanger people's lives with the security that, "Well, I don't need to worry about it 'cause the insurance company will cover it." That's-- There is a public policy argument while we don't, as we said in Fairfield, "We don't want some things insured 'cause we don't want people doing things that are very, very dangerous."

MR. COTTON: And I, I think that's certainly true but what, what the defense is looking for, what Nationwide is looking for is a rule that said, that's much broader than any rule that has ever been issued by this Court. They're looking for a rule that says, "If the police are following you and you hurt someone, there's an exclusion of coverage." And there is no police exclusion.

JUSTICE MEDINA: Can we just look at the exclusion itself?

MR. COTTON: And that's what, and that's what I'm trying to do. The exclusion itself says, "Property damage with bodily injury caused intentionally by or at the direction of the insured including willful acts which can be reasonably expected to result in damage or injury." So what that sets up is a fact issue as to whether or not the specific acts of this specific insured could be reasonably expected to result in damage or injury, and not everything he's done all day, but what he has done at that time that caused the injury.

JUSTICE MEDINA: I don't say, you isolate that specific incident. You know, if this is a slow speed chase involving a white Bronco going the speed limit and some yahoo jumps out in front of him, certainly the driver of that Bronco didn't intend to injure the person who jumped out in front of him, but that's a, that is a result of his negligent conduct.

MR. COTTON: And will be covered by insurance. There is no exclusion that would apply in that case. There is no broad exclusion that Nationwide is looking for that says, "If the police are following you, then, we are not responsible for the damages." I mean, that's what they're looking for. That would be new law in the State of Texas, because there is, there is no such exclusion.

CHIEF JUSTICE JEFFERSON: If there was no evidence that, that he attempted to avoid, that there is braking before the accident, then you would say there's no coverage here.

MR. COTTON: I, I'd have a much more difficult case, your Honor. It would be very difficult because in fact, what we'd have there is we'd have the totality of this conduct beforehand and we'd have maybe an open question on what was happening.

CHIEF JUSTICE JEFFERSON: Is it a-- I mean, there's a fact issue even though we all know that it very likely, in this sort of police chase scenario, that there's going to be injury to somebody else but caused by the, the suspect who is trying to get away a hundred miles an hour and going through red lights.

MR. COTTON: And again, my argument would be that a reasonable interpretation is that it's very likely for there to be an injury caused, if the wreck had happened while he's driving a hundred miles an hour through San Marcos, but that's not what happened. What happened actually really is no different than the sorts of wrecks that happen every day, hundreds of wrecks all over the state with the exception that he's got a police officer behind him.

JUSTICE MEDINA: That's a pretty big exception.

MR. COTTON: It is, but it's not big enough to override the province of the jury to weigh all of this evidence and make a decision because ...

JUSTICE BRISTER: Do you have a record of how fast he was going before he locked those brakes.

MR. COTTON: The officer was unable to offer a speed determination. But again, the burden of proof was on Nationwide to prove that they were entitled the exclusion so they didn't put on any evidence that he was going ...

JUSTICE BRISTER: The police was still after him.

MR. COTTON: The police were after him.

JUSTICE BRISTER: Red lights goin'?

MR. COTTON: Yes.

JUSTICE BRISTER: So he probably wasn't driving 35.

MR. COTTON: He had been dri-- he'd drive, Shortly before the incident, he had driven through a plowed field.

JUSTICE BRISTER: right.

MR. COTTON: He wasn't going a hundred either, and so we don't know how fast he was going.

JUSTICE BRISTER: If he's just trying to escape th police and should you know if you're running through and this is-- was this intersection was no signals, no stop signs or was there stop signs?

MR. COTTON: There was a stop sign.

JUSTICE BRISTER: And he ran it?

MR. COTTON: He ran it.

JUSTICE BRISTER: So if you're escaping the police and you run a stop sign, shouldn't you know that the-- shouldn't you ought to know that bodily injury will result from that if you do it enough times?

MR. COTTON: But your Honor, follow that logic. If you're not escaping the police, but you're simply going too fast and you run a stoplight-- stop sign, you ought to know the bodily injury is likely to occur as well and, -

JUSTICE BRISTER: I think that's right.

MR. COTTON: - and we don't want to exclude coverage in every case where it happens because really we wouldn't have any liability insurance anymore.

JUSTICE JOHNSON: Well, I've got a question. Why would you, why would you know it's likely to occur as supposed to possibly it could occur?

MR. COTTON: Okay. I think that's true. I think that ...

JUSTICE JOHNSON: Well, what's true?

MR. COTTON: I think that ...

JUSTICE JOHNSON: It seems to me like there's difference between, as I read here, it's a little different language than you, than you read but this says, "The insured knows or ought to know will follow from the insured's conduct." It seems like that's a different, different language in the policy than if it says, "could follow." This says, "will follow" that it seems like, so when we say someone runs the, the stop sign or red light, there's always a possibility you're going to have an accident but the-- it seems to me like there's difference between a possibility and a probability and this says, "will, will follow," which is almost like a conclusive type situation.

MR. COTTON: Yeah, and, and there is a difference, there is a slight wording difference between the charge that was submitted to the jury and the actual exclusion language of the policy.

JUSTICE JOHNSON: And the charge says, "They know or ought to know it would follow," not that it could follow or that there's a likelihood that it follow. It says, "would follow." So it seems to me like we're talking here semantics that, that make a difference.

MR. COTTON: And, and that's possible they could. That issue hasn't been raised by either side or brief by either side, either side and we've sort of proceeded with this appeal on the assumption that the

jury has made a finding that Nationwide does not fit within the policy exclusion as written in the policy. And what happened was the trial court made in a finding to disregard the jury's factual determination and so what the, the trial court, the actual language in the judgment that was entered by the trial court says, "The evidence at trial establishes a matter of law that the damages to the Tanners was caused intentionally by or at the direction of Richard Gibbons, including willful acts, the result of which the insured knew or ought to have known would follow from the insured's conduct and I think you make an excellent point, that there really is no evidence that shows that the insured, Richard Gibbons, knew someone was going to get hurt or ought to have known that someone would get hurt."

JUSTICE BRISTER: Well, there's a different-- I understand your saying. We're not-- we don't want this to apply to everybody that drives over the speed limit through a stop sign. But again, your focus is, forget about everything that occurred until we came to this intersection. Isn't there a difference between somebody who does this-- I don't know how many times he did it, 20 or 50 times, because they're escaping from the police versus a person who negligently does it because they weren't watching at that moment?

MR. COTTON: Not the way the policy exclusion is written. It, it, it doesn't make that difference. It says ...

JUSTICE BRISTER: Well, but I mean, Isn't there a diff- if you're going to do it 20 or 50 times, at some point, you're almost certain I'm going to do it, I'm getting away from the police, I'm going to do it 50 times. At some point, I'm certain. In that circumstance, I'm going to hit somebody. I might not get by with it once or twice, but when we take the whole context, the person would, would have to say a person knows for sure, they're going to hit somebody eventually.

MR. COTTON: Certainly, I agree that a person who did this 50 times would know that there's a good likelihood that somebody will get hurt.

JUSTICE HECHT: If this conduct was not intentional, would he have a first party claim for any PIP coverage or anything like that?

MR. COTTON: Would Gibbons have a first party claim?

JUSTICE HECHT: That's right.

MR. COTTON: I don't know the answer to that, your Honor. It's something I hadn't thought of. Under their policy, it requires a finding that his conduct was intentional. It just defines the word, "intentional," a little differently than we do in the standard Texas policy, to include this willful acts provision that we're arguing about. And again, what the policy says is, "Property damage or bodily injury caused intentionally, not activities that were negligent or activities that were reckless but the proper bodily injury was caused intentionally."

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The Court is now ready to hear argument from the respondent.

COURT ATTENDANT: May it please the Court. Mr. Heinemeyer will present argument for the respondent.

ORAL ARGUMENT OF L. CHRIS HEINEMEYER ON BEHALF OF THE RESPONDENT

MR. HEINEMEYER: May it please the Court. When trying this case, one of the difficult things to do was-- I was trying a contract case and plaintiff's counsel is trying a tort case. And I think that

explains one of the difficulties that arose in this case in that the jury is looking at the case where you have some plaintiffs who were innocent, who were involved in this horrible accident, who were hurt and they say, "We didn't do anything to cause it." And then, they turned around, they say, "Here's Nationwide, the big insurance company trying not to pay money." And I think it's easy to see how a jury in their mind are asking the question, "Do we compensate innocent injured people in this case or not?"

JUSTICE BRISTER: How much was the policy?

MR. HEINEMEYER: Policy is about \$300,000. It is \$300,000. So the judge, since we aren't trying the court case and the issue in this case is not compensation or no compensation, the Court based on the Nationwide v. Finkley case, out of Ohio and also the facts that the Court heard concluded that this case would've been a proper case for directive verdict even though the Court didn't grant it and that the evidence was conclusive ...

JUSTICE MEDINA: What is the willful and intentional conduct of the insured driver that excludes coverage?

MR. HEINEMEYER: What is, what is the will ...

JUSTICE MEDINA: What is the willful and intentional conduct? Is it fleeing the police? Is it putting himself in harms way and others and harms way because he's fleeing the police? What exactly did you use to make your determ-- your coverage determination?

MR. HEINEMEYER: That all of the evidence of what he did and his conduct in fleeing the police, and I think that this case is a very narrow case and it's very specific and you can't take the fleeing away out of the case or it changes the context.

CHIEF JUSTICE JEFFERSON: 'Cause the only evidence is that, as I leave the Court today, I've run a stop sign and I do it intentionally then, you're saying and I'm not, you know, no one is chasing me and I, and I hit somebody. Is there coverage or is there not under, under your analysis?

MR. HEINEMEYER: If you intentionally, -

CHIEF JUSTICE JEFFERSON: Yeah, well [inaudible].

MR. HEINEMEYER: - say, I'm going to run this stop sign, there's no coverage.

CHIEF JUSTICE JEFFERSON: Okay, so and what if I intentional-- what if I got a, a kid in the backseat and I intentionally turn to scold the kid and then run into somebody?

MR. HEINEMEYER: I ...

CHIEF JUSTICE JEFFERSON: Is there coverage there?

MR. HEINEMEYER: The policies are designed to cover inadvertence or negligence. And in that situation, that's an error of judgment, taking your view off the roadway and that would not be covered in this case, I mean, that would be covered, I believe because ...

JUSTICE JOHNSON: So how could it be covered if you intentionally turn your head, and I think we can presume, drivers know if you turn your head driving down the road, something is probably or likely, certainly, but probably going to have and don't, how do you differentiate an intentional act of turning your head while you're driving and an intentional act of running a stop sign neither of which you intended to hurt anybody?

MR. HEINEMEYER: Right. And I think that the, the issue really goes to this inadvertence, even though you intend to turn your head, that's during the process of a day or a moment you're making numerous decisions and numerous judgments ...

CHIEF JUSTICE JEFFERSON: Well, yes, but, but let me just get back

to this point. And so anytime a, a driver runs a red light, intentionally, then, there's no coverage if he, if he hits somebody in the intersection.

MR. HEINEMEYER: Well, I think it would depend on the overall factual circumstances if, if ...

CHIEF JUSTICE JEFFERSON: And, and the only fact I'm interested in is that I intentionally ran the red light.

MR. HEINEMEYER: I think if, if they say I intentionally ran the red light, I think there's no coverage.

CHIEF JUSTICE JEFFERSON: Then there's a lot of non-coverage out there in Texas.

MR. HEINEMEYER: Well, I don't-- I think most people when they're driving or making judgment calls, and I don't think that people are intentionally running red lights, just ...

JUSTICE O'NEILL: Let's say, let's say you have a-- an, an ordinance, a law against cellphone use while driving and you are talking on your cellphone, you know you're violating the law and you run a red light.

MR. HEINEMEYER: Uh-hmm. I don't think that would be the situation that would preclude coverage. And I think one of the things that in this Court in the case of State Farm vs SS, which was cited by the Court of Appeals, refers to some language that came from Prosser and Keeton and its-- it says at the end "In such cases, the distinction between intent and negligence is a matter of degree. The line has been drawn by the Courts at the point where the known danger ceases to only be a foreseeable risk which a reasonable person would avoid and becomes in the mind of a-- after a substantial certainty."

JUSTICE HECHT: Does that apply-- I know we said that in SS -

MR. HEINEMEYER: Uh-hmm.

JUSTICE HECHT: - and I even agree with it. But should that apply to insurance policy exclusions? Because we can all agree that if you intend the consequences, that's intentional, no two ways about that. So if I want to use my vehicle to strike somebody else and hurt them, that's intentional. The only question is, "If I do something short of that, intending to do that, like flee the police and then, the consequence occurs," that's when we get into trouble and I just wonder whether the, the insight by Prosser that this gets pretty philosophical apply-- should apply in insurance policy exclusions or whether we would be better of just having a bright line?

MR. HEINEMEYER: Well, I, I think it is a matter of degree and it is not a bright line but there is a line where you cross and I think that the facts of this case are such where you have someone who is going 80, 90 miles an hour, a hundred miles an hour through residential areas, business areas, commercial areas, the police officer testified that just down the road from where the accident occurred was an apartment complex. He drove on the wrong side of the state highway and had cars scattering. The totality of the circumstances of what he did in this circumstance is, I believe were such that we go beyond that whatever that line is ...

CHIEF JUSTICE JEFFERSON: That's under, under this policy if you're driving under the influence, is there a coverage applied when you hit somebody?

MR. HEINEMEYER: I don't believe-- I, I believe there is coverage for driving under the influence. I think the circumstances here is a, is a very narrow situation and I think one of the things that, that maybe important in looking at this case is let's take the car away and let's say we have somebody who is a shoplifter in a, a department store

and security is chasing him and he's running through the department store and going through the aisles, goes out, out the door and as he's running out the door, he runs into an elderly lady that's walking in the door and she falls and breaks her hip. I think that it-- in our state, in the circumstances of that situation, I think is very similar to this situation and I think when you take the car away, you start looking at it from the standpoint of what do we as reasonable people know or understand about this situation and there's a point where you take action that goes beyond being ...

JUSTICE MEDINA: That's still not an intentional conduct when running into the lady then, in your scenario, he didn't intend to do that, I'm sure he intended to get away. In the course of doing that, there was a collision that caused bodily injury.

MR. HEINEMEYER: Well, it's-- but it's willful conduct again and ...

JUSTICE MEDINA: It was willful conduct to escape, not willful conduct to intentionally cause a collision that prevents the escape.

MR. HEINEMEYER: Right, but in some point I think ...

JUSTICE MEDINA: [inaudible] do that?

MR. HEINEMEYER: Well, but the, the willful conduct is the acts that result in the harm and I think that's one of the things about this policy that Counsel said ...

JUSTICE HECHT: That's not what the policy says, that's not what the policy language says.

MR. HEINEMEYER: But it says, "Including willful acts, the result of which the insured knows or ought to know will follow from the insured's conduct," and this is a pol ...

JUSTICE BRISTER: Same thing as reckless?

MR. HEINEMEYER: I think this is beyond reckless.

JUSTICE BRISTER: I know but is, is this-- you know, there's reckless and then, there's intentional and is this intentional and reckless or just intentional?

MR. HEINEMEYER: I think it's intentional and a heightened recklessness. And I think that the other thing, I think this is a, a situation. This policy provision is one that, that does exist in policies in Texas and I think that we do see it. It's not unique ...

JUSTICE BRISTER: About Judge Hecht's question, does it-- would he have a first party claim? Is, is this the only thing that would prevent-- clause that would prevent first party coverage?

MR. HEINEMEYER: Well, this clause is an, is an exclusion of the liability coverage, so and that's not something that I've looked at to see what the, the PIP coverage says, but if, if the PIP coverage has an exclusion similar to that then, I would say it would exclude PIP coverage. And I think ultimately would get back to the issue of what are we insuring and insurance policies are there to insure inadvertence. And in this case, I think the conduct and the protracted nature of the conduct, the ongoing nature of the conduct, the risks that are continually created through that time period over the interstate highway, over the state highways, over residential roads ...

CHIEF JUSTICE JEFFERSON: But when you're saying even-- I, I just want to be clear. Even if the police at the chase hadn't happened and there weren't repeated incidences of this, that one instance of any driver intentionally running a stop sign or red light would not be covered if, if they, you know, if that was intentional if a, a collision occurs.

MR. HEINEMEYER: Well, I, I think it ...

CHIEF JUSTICE JEFFERSON: One incidence without all that

background.

MR. HEINEMEYER: Right. And I think it, it-- it's going to go-- it's going to have to look at some point at what the evidence of that intent was.

CHIEF JUSTICE JEFFERSON: Yeah, and my, and my hypothetical is that, I intentionally run a stop sign.

MR. HEINEMEYER: And if ...

CHIEF JUSTICE JEFFERSON: I intentionally run a stop sign.

MR. HEINEMEYER: If I'm going to a stop sign and I've run through that stop sign with the intent that I'm going to have an accident. And ...

CHIEF JUSTICE JEFFERSON: No, -

JUSTICE: Well, ...

CHIEF JUSTICE JEFFERSON: - no, no, no.

MR. HEINEMEYER: Well, ...

CHIEF JUSTICE JEFFERSON: Not with the intent to have, to have an accident, just I'm running a stop sign?

MR. HEINEMEYER: Well, if there is no incident then, we're not dealing with coverage but I think that ...

CHIEF JUSTICE JEFFERSON: But I'm, I'm challenging you, I'm not trying to-- I'm just trying to clear 'cause I think, what I think your argument is it boils down to doesn't really the police chase is an interesting part of the case and a, and a-- puts a lot more into this but at bottom, if a person intentionally runs a red light or a stop sign, you would say that, that's a willful act the result of which the insured knows or ought to know will follow from the insured's conduct that, that an accident could or would occur.

MR. HEINEMEYER: Well, if the intent is, I'm going to run that stop sign -

CHIEF JUSTICE JEFFERSON: Uh huh.

MR. HEINEMEYER: - and I'm-- then, you've got the requisite intent, you don't get to the reckless issue, you don't get to the "could or ought to know" because it is an intentional act.

CHIEF JUSTICE JEFFERSON: Right.

JUSTICE BRISTER: It's going to be intent property damage and bodily injury, right?

MR. HEINEMEYER: Right. So when I see ...

JUSTICE BRISTER: Until you know for sure, you're going to run into somebody if you just do it once, that's not going to be intent. I mean that, the difference is then, in the ought to know. If you're going to do it once versus you're going to do it a hundred times on the row then, you ought to know about bodily inju-- injuries going to occur is a lot stronger in the second than in first.

MR. HEINEMEYER: Right. And I think that, that the Court of Appeals also one of the things that they said, "It wouldn't the matter of when, it wouldn't the matter of if this accident was going to happen." It was a matter of when and I think the only reason that it didn't happen earlier was because of the conduct of the police in backing off and trying to do things to avoid that but Mr. Gibbons' conduct of continuing to do the eluding of the police and I think the intent also you look at what he did afterwards.

JUSTICE MEDINA: And there, there a lot of different fact scenarios but there here's one that, that bewilders me 'cause it's something that I've have experienced. So I want to know what your position would be in this situation. I drive a lot. And I drive on the road where there a lot of big eighteen-wheelers and you come up to some of these town's red lights and you got an eighteen-wheeler ba-- barreling behind you.

You've got to make constant decision, do I stop and take the risk of getting rear-ended or do I take a calculated risk and go to this intersection when this light is red and hope I don't hit anybody? so I'm, I'm have made a decision to run that red light so I don't get rear-ended, hoping I don't hit anybody as I cross that intersection. I think you're saying that because of that intent to run the red light, there would be no coverage in the event there was a subsequent collision with the vehicle in [inaudible].

MR. HEINEMEYER: Well, I would hope that we don't have that situation but if, if you did, I think it would depend on the circumstances and I, and I think there is an unusual circumstance that just if you make the decision to run it and I think you're, you're looking at a situation where hopefully there's not going to be anybody there. And I'm ...

JUSTICE MEDINA: But I'm thinking, Mr. Officer said 'Well you ran the red light therefore, you get ticketed' and therefore, Mr. Insurance Carrier, you're, you're going to deny coverage, 'cause I ran the red light.

MR. HEINEMEYER: Yeah, I don't think that scenario is one that is going, an insurance company is going to want to say there is no coverage. I ...

JUSTICE JOHNSON: Why not?

MR. HEINEMEYER: Well, I think that, that the situation is that you've got something where you don't have a protracted situation where you ought to know that. Now, if you've done that every, every stop sign on this road, all the way from San Marcos to Austin, well then, maybe we get to a situation where you start to say that is the case. But if you just do it once, I think you're, you're making some judgment decisions and maybe it was an error of judgment to go there. I think in this case, we've gone beyond that, we've got someone who is purposefully and deliberately fleeing the police and he continued to flee the police after.

JUSTICE GREEN: But, but let me ask you this. Would you agree that these policy exclusions should be read narrowly, construed narrowly?

MR. HEINEMEYER: Well, I think that's what the law is, that they are to be construed narrowly.

JUSTICE GREEN: So would you see a difference between a situation where somebody, as the Chief Justice was pointing out, intentionally running a stoplight but not knowing whether there's could be an accident or not. And somebody coming up to a stoplight and seeing somebody coming and, and knowing you know to be that by pulling out in front of that person that they will cause an accident or ought to know that by pulling out in front of that car ought to, to, to know that there's going to be an accident occurring. There's a difference there because in one instance you know you're going to have an accident and the other one you really don't know.

MR. HEINEMEYER: Right.

JUSTICE GREEN: So would that make a difference in this, in interpreting exclusion?

MR. HEINEMEYER: I, I think it is and I think it going in-- it's the totality of the circumstances.

JUSTICE GREEN: Well, in this particular case, Mr. Gibbons didn't know going through that intersection. He didn't see somebody coming and intentionally go out there. He was just being chased and went through the intersection, maybe there's going to be somebody, maybe there wasn't. He didn't really know that.

MR. HEINEMEYER: Well, when the testimony from the police officer

was that this was an open area and that you could see the ve-- the Tanner vehicle approaching the intersection and he was, I think a hundred yards behind and he said, "I could see that Tanner vehicle approaching and I knew that there was an accident going to occur." And I think that, that's kind of the other side of this brake light thing, is that as he's approaching, he has realized this that there's an accident going to happen and the reason that, that accident happened though is not because of some inadvertence, it's because of his deliberate, willful, intentional conduct of continually evading the police in a manner which put everybody on the roadway at harm....

JUSTICE WILLETT: You were about to mention a couple of times and you were cut off the questions about his post-accident conduct that sheds light on his intent.

MR. HEINEMEYER: I, I think that's true. I think that if-- I don't know that it would've made a difference, if he had, had not gone on but I think it does add some might and I think that's one of the things about the Ohio ...

JUSTICE WILLETT: What, what add light? What were you going to describe?

MR. HEINEMEYER: Well, from the accident scene he continued off, led the police on the further chase, went into a field and the only way the police were able to stop his vehicle was to shoot out first one tire, he still didn't stop because he would go in second shoot out the second tire. And then, they even had to pull him out of the vehicle. So this is someone who had set in, in place the course of action that continued through this incident and I think that when you look at the totality of the circumstances here and I think that's something that's important that the Court of, the Court in Ohio noted was that it just wasn't just one thing, it was the totality of the protracted eluding of the police and I think that was the case here.

JUSTICE HECHT: So, in SS, the Court agreed with that but thought that is was a fact question. Why isn't there as much of the fact question here?

MR. HEINEMEYER: Well, I think in this case, the fact question is not the, the brake lights. The-- And I think that's the only place where you can draw a different interpretation in this case that the issue in this case is what is his conduct and what resulted in that and ...

JUSTICE HECHT: Well, in SS, there was an optometrist, who had herpes and had relations and said, but he didn't intend to give his friend herpes and the argument was, "Well, how could you not? You're in health care and you know what the consequences of that are." And the answer was, "Well, but it doesn't always happen and so maybe it wouldn't." And I thought it was pretty clear but on the court thought, there was a fact question in that case and how it se-- it seems to me, well, yes, you may have an accident but maybe you won't trying to get away but you're doing something reckless, why doesn't all that fall into the same context that SS was?

MR. HEINEMEYER: Well, I think that we went be-- in this case, we went beyond the conduct that it was something that there was a risk that was foreseeable to where there was a substantial probability, a substantial certainty that this was going to happen. It was just a matter of when.

JUSTICE BRISTER: Did Gibbons, did Gibbons testified at your trial?

MR. HEINEMEYER: Gibbons is-- Nobody knows where Gibbons is.

JUSTICE BRISTER: [inaudible]?

MR. HEINEMEYER: Well, he, he-- he's seen in the record but he

skipped bail and, and disappeared and nobody has seen him since.

JUSTICE BRISTER: So what kind of fact question did the jury have before trying to figure out Gibbons' intent if Gibbons didn't testify?

MR. HEINEMEYER: Well, I don't, I don't think there was a fact issue of Gibbons' intent. I think it's clear from the totality of all the circumstances and the actions and I think acts are more important than what he would have said because I think ...

JUSTICE BRISTER: Certainly no credibility questions about Gibbons?

MR. HEINEMEYER: I-- I've-- No, but I think that one of the, the things that was an issue in the Court ...

CHIEF JUSTICE JEFFERSON: You can complete your thought.

MR. HEINEMEYER: That was an issue in the Ohio court because that defendant or insured was saying, "I didn't mean to." and, and I think that's the same thing here. That's not important, it's the acts that are important. Thank you.

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel.

REBUTTAL ARGUMENT OF DON R. COTTON ON BEHALF OF PETITIONER

MR. COTTON: The fact issue is whether or not the evidence put on by Nationwide at this trial established that they were entitled to this exclusion, this narrowly drawn exclusion in their liability policy. And they had the burden of proof to show that Mr. Gibbons intentionally caused the property damage or bodily injury that was being claimed by the plaintiffs in the case.

JUSTICE MEDINA: That, that exclusion does seem to be narrow as, and, I certainly thought that when I first read it but as I listened to the discussion. These three words keep on popping up "ought to know," "ought to know." That-- that seems ah that seems unusual in an exclusion. That seems real broad 'cause someone ought to know many things in this circum-- in this particular circumstance, it seems to me that any reasonable prudent driver ought to know that, that conduct is going to cause bodily injury to somebody.

MR. COTTON: But if we read at that broadly, that hits at the questions that Chief Justice is asking and other Members of the Court are asking, where do we draw the line? I mean, we know that if you're approaching an intersection and the light turns yellow and you're late for your doctor's appointment and so you're going to go ahead and hit it even though it's going to turn red before we reach the intersection.

JUSTICE MEDINA: But it depends if there's a camera or not then, you might slow down.

MR. COTTON: Good point. I mean, we know in that case that a reasonable driver shouldn't do that and reasonable driver ought to know that it's likely to cause injury but people do it everyday.

JUSTICE O' NEILL: Well, it doesn't say, "ought to know likely to cause." And I mean, it seems like that the policy tries to then, ought to know is pretty broad but it doesn't say, "ought to know is not likely to follow." I mean, it says, "ought to know will follow."

MR. COTTON: Right.

JUSTICE O' NEILL: So I mean, -

MR. COTTON: Which is why, -

JUSTICE O' NEILL: - it seems to be a little tighter.

MR. COTTON: - which is why we argue that it takes evidence to fit

in to this exclusion that Nationwide simply didn't produce at trial.

JUSTICE WILLETT: On terms of evidence, aside from the fact that Gibbons, you know, hit the brakes before the collision, what other evidence is there that he did not-- What, what else takes away from willfulness or his intentional conduct? Anything besides the, the brakes?

MR. COTTON: Well, that's the only evidence that shows that he wasn't acting intentionally but again, the burdens was on Nationwide -

JUSTICE WILLETT: Right.

MR. COTTON: - to prove that he was. And they have no evidence that he was. They have evidence that he was trying to flee the police, they have evidence that he was trying to avoid getting caught, they have evidence that he was willing to drive through San Marcos at a high rate of speed but they don't have any evidence that he intentionally or willfully caused injury to the Tanner family.

JUSTICE WAINWRIGHT: "The brief says that Officer Arredondo who was a hundred feet behind Gibbons as he approached the intersection could see that Gibbons was still traveling at an unsafe speed, and he saw the collision, were Officer Arredondo's lights were-- were his lights on and flashing."

MR. COTTON: I believe that was the testimony if I remember correctly.

JUSTICE WAINWRIGHT: So they were in the mids-- still in the middle of the police chase at the time the accident occurred.

MR. COTTON: Correct. And I don't, and I don't want to give the wrong impression. I'm not saying that there wasn't still a police pursuit, what I'm saying is that there was not still a hundred mile an hour police pursuit through an urban area that we know would cause an accident.

JUSTICE WAINWRIGHT: But there was still a po-- police pursuit at an unsafe speed with police officers following him with flashing lights.

MR. COTTON: Yes, your Honor, there was.

JUSTICE WAINWRIGHT: And after that collision, they continued after him and he continued to flee.

MR. COTTON: That, that-- that's correct.

JUSTICE JOHNSON: Counsel, you said that we know a hundred miles an hour through a residential area will cause an accident. I thought it didn't in this case.

MR. COTTON: Well, it didn't and perhaps, I misspoke. I would agree that it's highly likely.

JUSTICE JOHNSON: Highly likely.

MR. COTTON: I would agree with that.

JUSTICE HECHT: What's the answer to the argument that Ohio law applies?

MR. COTTON: I'm sorry.

JUSTICE HECHT: What's the answer to the argument that Ohio law applies?

MR. COTTON: Well, that argument hasn't been made. The-- but it stands that Nationwide never raised that argument and haven't brief that argument. I, I think the law is clear that, that [inaudible] ...

JUSTICE BRISTER: And you all, and you all don't either?

MR. COTTON: I'm sorry.

JUSTICE BRISTER: And you all don't either?

MR. COTTON: We don't either. We don't contend that Ohio law applies, what we, we do agree is that the Ohio insurance policy is the contract at issue but it's Texas law that's going to govern what that

policy means for Texas drivers.

JUSTICE O' NEILL: Is that a standard exclusion? Is that written into Texas contracts?

MR. COTTON: It's not. It's different than the one in Texas. It's-- it-- Texas has a-- has an intentional exclusion but the language is a little bit different and so ...

JUSTICE MEDINA: "Ought to know" language?

MR. COTTON: It's not in there, it's different. It's a little different and the only case that anybody turned up interpreting the Ohio exclusion is the one we've been arguing about the Finkle case, which I would argue, isn't controlling 'cause it's a very different sense of circumstances and it's-- it's important to note that in that Ohio case, the, the defense apparently raised the argument are-- Excuse me, the appellant in that case raised the argument that the Ohio court was going to create too broad of an exclusion. And the Court was real clear that they didn't want to do that, they didn't want to excuse all sorts of conduct from the, from the insurance. And so they said, "This case is very narrow and only applies to these fact circumstances."

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted and the Court will take a brief recess.

COURT ATTENDANT: All rise.

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