

IN THE SUPREME COURT OF TEXAS

No. 02-0090

UTICA NATIONAL INSURANCE CO. OF TEXAS, PETITIONER,

v.

AMERICAN INDEMNITY CO. AND TEXAS PROPERTY &
CASUALTY INSURANCE GUARANTY ASSOCIATION, RESPONDENT

ON PETITION FOR REVIEW FROM THE
COURT OF APPEALS FOR THE THIRD DISTRICT OF TEXAS

JUSTICE HECHT, joined by JUSTICE OWEN, dissenting.

Four patients alleged that they contracted Hepatitis C from injections of fentanyl, an anesthetic, that was contaminated by a surgical technician, David Wayne Thomas, while stealing the drug for his own use. The patients asserted that their respective treating physicians, and the other anesthesiologists with whom they associated in Mid-Cities Anesthesiology, P.A. — ten of them altogether — were negligent in not securing the drug and supervising Thomas so as to prevent the contamination. The association and its members carried commercial general liability (CGL) insurance and professional liability insurance. The patients have settled, and the only remaining dispute is between the insurers over which of them was obligated to defend and indemnify the claims. One of the CGL carriers, Utica National Insurance Co., contends that the claims were not covered by its policy. The other CGL carrier, American Indemnity Co., and the receiver for the professional liability carrier, Texas Property and Casualty Insurance Guaranty Association, disagree.

In my view, if the association and its member physicians were negligent in failing to prevent the contamination of a drug they used in medical treatment, it was because they breached a professional standard of care, whether the injured patients were theirs or their associates', and not because they breached some ordinary duty of care that they may have owed irrespective of their medical training and practice.¹ Utica concedes in this Court that it might be possible for a physician to fail to secure drugs properly and yet violate only an ordinary duty of care, not a professional standard. Perhaps so. Maybe allowing liquid drugs to leak or pills to spill so that someone slips and falls does not involve a professional standard of care. Utica concedes the point in reliance on the strength of its argument that even if the patients' injuries were caused in part by non-professional negligence, such negligence was necessarily concurrent with professional negligence and therefore outside the coverage of its CGL policy, based on the line of cases the Court cites.² The Court takes Utica's concession³ and then disagrees with its argument, concluding that the patients' injuries may have been caused by non-professional negligence *only*. I cannot see how it is remotely possible for a physician to be negligent in preserving the purity of medications administered to patients by himself and those with whom he associates and yet not be in breach of a professional standard of care.

Thus, I would hold that the patients' claims were for professional liability, against which Utica had no obligation under its CGL policy to defend or indemnify. The Court does not foreclose

¹ Cf. *Harris Methodist Health Sys. v. Employers Reinsurance Corp.*, No. 3:96-CV-0054-R, 1997 U.S. Dist. Lexis 23660 (N.D. Tex. July 25, 1997) (holding that claims against a hospital for injury caused by David Wayne Thomas's criminal activities were professional liability claims).

² *Ante* at ____.

³ *Ante* at ____ n.3.

this result but remands for fact findings. If I am correct — if the association and its members could not have been negligent without violating a professional standard of care — the outcome will eventually be the same. I remain troubled by the way the Court goes about reading insurance policies, which we constantly reiterate must be interpreted and construed like other contracts,⁴ but which hardly ever are because courts approach them, not as neutral arbiters of words on a page, but in hopes there will be coverage.

The standard form Texas Businessowners Policy of commercial general liability insurance that is available to businesses of all types and that Utica National Insurance Co. issued to Mid-Cities Anesthesiology, P.A. and its ten member anesthesiologists excluded from coverage “[b]odily injury’ . . . due to rendering or failure to render any professional service”. According to the Court, what the exclusion really means is that the policy does not cover “[b]odily injury . . . due to rendering or failure to render any professional service *in breach of the professional standard of care*”. This is by no means a simple clarification; the Court’s added phrase changes the meaning significantly. As written, the exclusion applies to *any* professional service; as rewritten by the Court, it applies only to any *negligent* professional service. Why? Because, the Court explains,

⁴ *Ante* at ___ (citing *National Union Fire Ins. Co. v. CBI Indus., Inc.*, 907 S.W.2d 517, 520 (Tex. 1995) (“Insurance policies are controlled by rules of interpretation and construction which are applicable to contracts generally.”); *accord, e.g., American Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 157 (Tex. 2003) (“We interpret insurance policies in Texas according to the rules of contract construction.”); *Progressive County Mut. Ins. Co. v. Sink*, 107 S.W.3d 547, 551 (Tex. 2003) (“It is well settled that the general rules of contract construction apply to the interpretation of insurance contracts.”); *Texas Farmers Ins. Co. v. Murphy*, 996 S.W.2d 873, 879 (Tex. 1999) (“In Texas, insurance contract interpretation is governed by general contract interpretation rules.”); *Balandran v. Safeco Ins. Co. of Am.*, 972 S.W.2d 738, 740-741 (Tex. 1998) (“[I]nsurance contracts are subject to the same rules of construction as other contracts.”); *Forbau v. Aetna Life Ins. Co.*, 876 S.W.2d 132, 133 (Tex. 1994) (“Interpretation of insurance contracts in Texas is governed by the same rules as interpretation of other contracts.”); *National Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991) (“Generally, a contract of insurance is subject to the same rules of construction as other contracts.”); *Western Reserve Life Ins. Co. v. Meadows*, 261 S.W.2d 554, 557 (Tex. 1953) (“It is the settled law in this state that contracts of insurance in their construction are governed by the same rules as other contracts, and that terms used in them are to be given their plain, ordinary and generally accepted meaning unless the instrument itself shows them to have been used in a technical or different sense.”).

“due to” implies a closer causal connection than “arising out of”, another phrase used in the policy. The Court may be correct about the difference between the two phrases. A patient’s slip and fall in a physician’s office might be argued to “arise out of” the rendition of professional services simply because the patient was on the premises for purposes of treatment but could not be said to be “due to” the rendition of professional services unless the medical treatment (or failure to treat) directly caused the injury, say, by making the patient woozy and apt to fall. But to use this difference in the connection between events to define “professional services” is simply a non sequitur. There is no rational relationship between the meaning of “due to” and the meaning of “professional service”. Whether “professional service” means *any* professional service or only professional service in breach of a professional standard of care has nothing whatever to do with whether “due to” means the same thing as “arising out of”. The policy could have been written to exclude coverage for bodily injury any one of three ways, either:

- (1) due to rendering or failing to render any professional service; or
- (2) arising out of rendering or failing to render any professional service; or
- (3) due to rendering or failing to render any professional service in breach of the standard of professional care.

The Court concludes that because (1) does not mean (2), (1) must mean (3). It is not clear why, assuming (1) does not mean (2), (1) should not mean (1).

Nor is it clear why either of the two generalities support its construction of the policy language. The Court says it ““must adopt the construction of an exclusionary clause urged by the insured as long as that construction is not unreasonable””.⁵ We have made clear that this is true only if the exclusionary clause is ambiguous:

⁵ *Ante* at ___ (citing *National Union Fire Ins. Co.*, 811 S.W.2d at 555).

Where an ambiguity involves an exclusionary provision of an insurance policy, we “must adopt the construction . . . urged by the insured as long as that construction is not unreasonable, even if the construction urged by the insurer appears to be more reasonable or a more accurate reflection of the parties’ intent.”⁶

If an exclusionary clause is clear, we cannot ignore its plain meaning just because someone can imagine some other construction that is not unreasonable. No one argues in this case that the exclusionary clause is ambiguous. Importantly, it is not the resulting coverage that must not be unreasonable, otherwise policy language would not mean much. Earlier this Term, in *American Manufacturers Mutual Insurance Co. v. Schaefer*, the insureds argued that an insurer’s obligation under a standard automobile policy to “repair” a damaged vehicle should include compensation for loss in value.⁷ Such coverage would not be unreasonable, but it cannot fit within the meaning of “repair”. Likewise, there is nothing unreasonable about the broader coverage the Court creates by rewriting the exclusionary clause here. Utica could reasonably have offered it, and Mid-Cities Anesthesiology could reasonably have bought it. But the rule is that the insured’s construction of the exclusionary clause — that is, the reading of the words on the page — must not be unreasonable. And it is simply not a reasonable construction of the English language to say that “any professional service” means the same thing as “any professional service in breach of the professional standard of care”. “Any” does not mean “some”, even in insurance policies.

The Court adds: “Reasonable expectations are often affected by the conditions surrounding the formation of the policy language and by the type of clause at issue.”⁸ I must confess that I have

⁶ *Balandran*, 972 S.W.2d at 741 (alteration in original) (quoting *National Union Fire Ins. Co.*, 811 S.W.2d at 555).

⁷ 124 S.W.3d 154, 162 (Tex. 2003).

⁸ *Ante* at ____.

no idea what the Court intends by this statement, which is made without reference to authority. Standing alone, it is a truism: reasonable expectations are, indeed, often affected by such things. But the statement might be taken to imply that someone's reasonable expectations — probably an insured's, and probably not an insurer's — have something to do with determining the coverage afforded despite the policy language. That implication risks tension with the Court's prior pronouncement that “an insured may not complain that his or her reasonable expectations were frustrated by policy limitations which are clear and unambiguous.”⁹ No one argues here, and the Court does not conclude, that the exclusionary clause in Utica's policy was ambiguous. The policy form was prescribed by the State Board of Insurance, the conditions surrounding the formation of the policy language are unknown, the clause is what it is, and one can search the whole policy from beginning to end and still not find anything to indicate that the Board or Utica or Mid-Cities Anesthesiology intended for “any professional service” to mean anything other than just that.

In *Schaefer*, a unanimous Court wrote: “we may neither rewrite the parties' contract nor add to its language.”¹⁰ The Court is no more careful in applying its own opinions than it is in construing insurance policies. What the JUSTICES in today's majority really meant by the assertion in *Schaefer* was that “we may neither rewrite the parties' contract nor add to its language *unless we believe we should*.” One way or the other, the Court must add a few words to its *Schaefer* opinion so that it can add a few words to Utica's policy.

⁹ *Murphy*, 996 S.W.2d at 878 (Tex. 1999) (quoting *McAllister v. Millville Mut. Ins. Co.*, 640 A.2d 1283, 1288 (Pa. Super. Ct. 1994)); see also *Wilkie v. Auto-Owners Ins. Co.*, 664 N.W.2d 776, 782 (Mich. 2003) (“This approach, where judges divine the parties' reasonable expectations and then rewrite the contract accordingly, is contrary to the bedrock principle of American contract law that parties are free to contract as they see fit, and the courts are to enforce the agreement as written absent some highly unusual circumstance, such as a contract in violation of law or public policy.”).

¹⁰ *Schaefer*, 124 S.W.3d at 162 (citing *Royal Indem. Co. v. Marshall*, 388 S.W.2d 176, 181 (Tex. 1965) (“Courts cannot make new contracts between the parties, but must enforce the contracts as written.”)).

I respectfully dissent.

Nathan L. Hecht
Justice

Opinion delivered: July 9, 2004