

Supreme Court of Texas Insurance Law Topics

Seger v. Yorkshire Ins. Co., LTD.

No. 13-0673

Case Summary written by Emily Brown, Staff Member.

JUSTICE GREEN delivered the opinion of the Court.

Randall (Randy) Seger died in 1992 while working as a derrick hand on a hydraulic-life drilling rig that suddenly collapsed. Randy was employed by Employer's Contractor Services, Inc. (ECS) at the time of the accident, which provided services to Diatom Drilling Co., L.P. (Diatom). Diatom was insured by a commercial general liability (CGL) policy issued by fifteen offshore insurers, including Yorkshire Insurance Co. and Ocean Marine Insurance Co. (the CGL insurers). The cover note for the policy identified Diatom and ECS as the insured parties, and contained a special condition excluding leased-in workers and employees. However, the policy covered independent contractors. Randy's parents, the Segers, sued the drilling company for the wrongful death of their son. The company demanded that the CGL insurers defend it in the litigation, but the insurers refused based on lack of coverage.

While the wrongful death litigation was pending, the CGL insurers denied that Randy's death was a covered occurrence under the policy and refused to provide a defense or to settle the case. Three settlement attempts were made by the parents, all within the \$500,000 limits of the policy, but all were refused by the CGL insurers. Diatom remained as the only defendant, as the Segers nonsuited the remaining partners. The trial court found Diatom liable for Randy's death and awarded \$15 million plus interest to the Segers. Diatom assigned its rights against the insurers to the Segers, who in turn brought a *Stowers* action against the insurers.

The *Stowers* action was brought against the CGL Insurers, seeking damages for wrongful refusal to defend Diatom in the wrongful death litigation and for negligent failure to settle the Segers' claim within the limits of Diatom's insurance policy. Claims against the insolvent CGL Insurers were settled and dismissed, leaving only claims against Yorkshire and Ocean Marine (the *Stowers* Insurers). The

Stowers Insurers filed a third-party claim against Diatom and ECS, which was severed by the trial court. At trial, the jury returned a verdict in favor of the Segers, and the trial court awarded \$37,213,592.01 for the *Stowers* Insurers' negligence and causation.

In the first appeal, the *Stowers* Insurers challenged the trial court's procedural rulings, which were affirmed by the court of appeals. The *Stowers* Insurers also challenged the trial court's rulings on coverage, and the court of appeals reversed, holding that the trial court erred in granting summary judgment on the issue of coverage. The court of appeals also reversed the trial court's judgment that the Segers' claims were covered by Diatom's CGL policy. The court of appeals remanded for a new trial, referring to the first trial as *Seger I*.

On remand, the jury found that: (1) the *Stowers* Insurers negligently failed to settle the Segers' wrongful death claim; (2) Randy was not an employee or leased-in worker of Diatom; and (3) the *Stowers* Insurers wrongful refusal to provide Diatom a defense in the wrongful death action waived their right to control Diatom's defense. The trial court issued a judgment that the Segers' claims were covered by Diatom's CGL policy and established damages for the Segers as a matter of a law. Damages were awarded for \$71,696,547. The *Stowers* Insurers again appealed.

The *Stowers* Insurers raised seven issues on appeal, and the court of appeals reversed the trial court's judgment, holding that the evidence was legally and factually insufficient, and that the judgment was the result of a proceeding that could not be characterized as a fully adversarial trial. The court of appeals referred to this opinion as *Seger II*.

Issue before the Supreme Court of Texas: Can the Segers' establish the required *Stowers* elements by showing that their claimed loss against Diatom was included under the coverage of the CGL policy?

First, the Court considered whether the element of coverage was met. Diatom's CGL Policy covered liability for injury to independent contractors, but the cover note to the policy contained a condition excluding leased-in employees and workers. The Court reasoned that the CGL policies were never meant to cover claims by employees against their employers.

The Segers argued that the burden of proof rested on the *Stowers* Insurers to prove that they were entitled to the defense of non-coverage,

which was affirmed by the court of appeals. However, the Court determined that in any insurance action, an insured is not entitled to recover under a policy unless facts are pleaded that prove that the alleged damages are covered by the policy and thus, the insured has the burden of proof. The Court extended this by reiterating that the insured must also establish that the injury was incurred at a time covered by the policy and by someone whose injuries are covered by the policy.

Because employees of Diatom and ECS were expressly excluded from the policy and Randy was not an employee or “person insured” by the policy, the Court found that he was a third party to it; therefore, Diatom’s liabilities to him were to be covered unless a policy exclusion applied.

Secondly, the Court looked to determine whether the Segers’ claim was excluded from coverage under the policy. The *Stowers* Insurers claimed the exclusions that applied for eligible surplus lines insurers. Under Chapter 981 of the Insurance Code, in order to qualify as an eligible surplus line insurer, the insurers had to provide proof of authorization to write insurance from their state or country to the Texas Department of Insurance, must maintain at least fifteen million in capital and surplus, and must comply with all applicable nationwide uniform standards adopted by Texas. They were also required to possess a surplus lines license issued by the department. While the *Stowers* Insurers met these burdens, the Court determined that they did not fit the exception under Section 101.201(b) due to the fact that they had not presented any evidence that they had paid a premium tax. The Court determined that they were limited by the section’s restrictions, and that the insurance policy was “unenforceable” by the *Stowers* Insurers.

The Segers argued that the *Stowers* Insurers were not able to enforce the policy exclusions under section 981.005(a) due to the fact that the policy was “unenforceable.” However, the Court looked to previous cases, where it was determined that in certain situations, the insured may elect to either rescind or enforce a policy that is unenforceable by the insurer. Because the Segers relied on the policy to bring their *Stowers* action, they were to be bound by all of the policy’s terms and thus, the *Stowers* Insurers were entitled to plead and prove the policy exclusions precluded coverage.

Third, the Court looked to determine whether Randy was an employee of Diatom. The *Stowers* Insurers argued that Randy was an employee, as the definition of leased-in worker as determined by the court of appeals was “a person who performs work for the insured under an agreement with another allowing temporary use of the worker, even though the leased worker would not be an employee of the insured.” The Court found that an agreement signed by the drilling company was for “temporary use of personnel,” and that workers would be supplied to Diatom only as needed. Each worker supplied was not used for every stage of the business, and the use of each worker was determined to be only temporary. The Court further determined that even if Randy were an independent contractor to Diatom through his employment at ECS, he would still be considered a leased-in worker under the policy definition.

The Court concluded that the evidence in the record was legally insufficient to support the jury’s finding that Randy was not a leased-in worker. The Court held that Randy Seger was a leased-in worker as a matter of law, and the Segers’ claim was excluded from coverage under the CGL policy and thus their *Stowers* action failed as a result. The judgment of the court of appeals was affirmed, which reversed the trial court’s judgment and rendered judgment that the Segers take nothing.

In re Nationwide Ins. Co.

No. 15-0328

Case Summary written by Caroline McLeod, Staff Member.

JUSTICE DEVINE delivered the opinion of the Court.

Brian Besch sued Nationwide Insurance Company for breach of contract, fraud, and occupational disparagement in Travis County, Texas, on December 26, 2012. Besch’s contract with Nationwide identified Franklin County, Ohio, as the proper forum for a dispute concerning the contract.

Nationwide’s attorney indicated that Nationwide would seek to enforce the forum-selection clause by moving to dismiss the Texas litigation. It did not do so, however, until January 2015 after changing counsel in the case. Nationwide filed its motion to dismiss in Texas after the expiration of the contractual-limitations period in Ohio had already run.

Besch contended that Nationwide waived the forum-selection clause by substantially participating in the Texas litigation, coupled with the delay in asserting its rights. He argued that Nationwide's delay was prejudicial and the motion to dismiss should be denied. In response, Nationwide promptly agreed to waive enforcement of the contractual-limitations clause in Ohio. The trial court rejected the waiver as "untimely" and denied the motion to dismiss. Nationwide thereafter petitioned the court of appeals for mandamus relief and was denied.

Issue: Did the trial court abuse its discretion by denying Nationwide's motion to dismiss premised on the forum-selection clause?

The Texas Supreme Court applied a two-step test to determine whether Nationwide waived the contractual forum-selection clause: (1) whether Nationwide's conduct in the Texas litigation was substantial, and (2) resulted in prejudice. Both factors must occur for a right to be waived. The Court affirmatively answered the first prong of the analysis because Nationwide took more action in the case than Besch. For the second prong, the Court held that Besch was not prejudiced because once Nationwide agreed to waive the contractual-limitations period, Besch was free to pursue his case in Ohio. The Court also rejected Besch's argument that he would be prejudiced if the forum-selection clause was enforced because the statute of limitations in Ohio for his fraud claim had run. Besch's fraud claim did not become barred in Ohio until seven months after Nationwide invoked the forum-selection clause. The Court concluded that there was no evidence that Nationwide's conduct in the litigation resulted in prejudice. Thus, the trial court abused its discretion in refusing to enforce the forum-selection clause because the clause had not been waived. The Court conditionally granted petition for the writ of mandamus and directed the trial court to enforce the forum-selection clause.

JUSTICE GUZMAN, dissenting, joined by JUSTICE BROWN.

In the dissenting opinion, Justice Guzman asserted that Besch was potentially prejudiced by the expiration of the contractual-limitation period for his breach of contract claim. She argued that, even though Nationwide promised to waive the contractual-limitations clause, there was no proof that Nationwide would honor that promise. She ultimately disagreed with the Court that Nationwide cured the

prejudice arising from the expiration of limitations on Besch's contract claim.

Justice Guzman also contended that the Court did not properly consider all of the surrounding circumstances upon finding that there was no resulting prejudice. She argued that, by initiating substantial conduct in the litigation and deferring to enforce the forum-selection clause for two years, Nationwide implied forbearance on the right to litigate in Ohio upon which Besch justifiably relied. As a result, Besch's ability to bring his fraud claim in Ohio was eliminated. The loss of Besch's claims, Justice Guzman argued, establish that he was prejudiced, and the trial court properly exercised its discretion.