NUMBER 13-19-00605-CV

COURT OF APPEALS

THIRTEENTH DISTRICT OF TEXAS

CORPUS CHRISTI – EDINBURG

STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, **Appellant,**

v.

ROLANDO LOPEZ, INDIVIDUALLY AND ROLANDO LOPEZ D/B/A R&A TRANSPORT, **Appellees.**

On appeal from the 197th District Court of Willacy County, Texas.

MEMORANDUM OPINION

Before Chief Justice Contreras and Justices Longoria and Perkes
Memorandum Opinion by Chief Justice Contreras

This appeal of a summary judgment involves a question of insurance coverage. Appellant State Farm Mutual Automobile Insurance Company (State Farm) argues on appeal that the trial court erred when it ruled that the "in use" provision in the commercial

automobile insurance policy at issue provided coverage to appellees Rolando Lopez, individually and Rolando Lopez d/b/a R&A Transport (Lopez).[1] We reverse and render.

I. BACKGROUND

On September 6, 2014, Raul Ramirez suffered personal injuries after colliding in his commercial vehicle with cattle that had roamed onto Texas Highway 181 in San Patricio County, Texas. On June 16, 2016, Ramirez sued the cattle's owner (Fite Farms) and Lopez, alleging Lopez failed to properly secure the gate to Fite Farms after picking up a shipment, which allowed the cattle to roam onto the highway. State Farm issued the commercial automobile insurance policy that covered Lopez's vehicle. Under a section titled "Coverage," State Farm's policy provided:

> We will pay all sums an ***insured*** legally must pay as damages because of a ***bodily injury*** or ***property damage*** to which this insurance applies, caused by an ***accident*** and resulting from the ownership, maintenance[,] or use of a covered ***auto***.
>
> We have the right and duty to defend any ***suit*** asking for these damages. However, we have no duty to defend ***suits*** for ***bodily injury*** or ***property damage*** not covered under this Coverage Form. We may investigate and settle any claim or ***suit*** we consider appropriate. Our duty to defend or settle ends when the Liability Coverage Limit of Insurance has been exhausted by payment of judgments or settlements.

(emphasis in original). The policy did not define "use."

On January 13, 2017, State Farm filed a plea in intervention against Lopez seeking a declaration that it owed no duty to defend or indemnify him in Ramirez's lawsuit because the accident did not result from the "use" of the covered vehicle. Ramirez filed a motion for summary judgment on State Farm's declaratory action arguing that the vehicle was in "use" in relation to Ramirez's accident, and thus, the policy covered Lopez in the suit.

[1] Lopez has not filed a brief to assist us in the resolution of this appeal.

Specifically, Ramirez argued that the "complete operation rule" brought the use of the gate under the policy because the use of the gate was part of the "loading and unloading" of the truck. State Farm filed a response and its own motion for summary judgment arguing that the policy did not cover Lopez because the vehicle was not in "use," per Texas Supreme Court precedent. After a hearing, the trial court signed an order granting Ramirez's motion for summary judgment and denying State Farm's motion. State Farm filed a motion for new trial, which was denied by operation of law after a hearing, and a motion to sever the declaratory suit, which was granted. This appeal followed.

II. STANDARD OF REVIEW

We review the trial court's ruling on a motion for summary judgment de novo. *Travelers Ins. v. Joachim*, 315 S.W.3d 860, 862 (Tex. 2010). In the case of a traditional summary judgment, the issue on appeal is whether the movant met the summary judgment burden by establishing that no genuine issue of material fact exists and that the movant is entitled to judgment as a matter of law. *See* TEX. R. CIV. P. 166a(c); *Mann Frankfort Stein & Lipp Advisors, Inc. v. Fielding*, 289 S.W.3d 844, 848 (Tex. 2009).

On cross-motions for summary judgment, each party bears the burden of establishing it is entitled to judgment as a matter of law.[2] *City of Garland v. Dallas Morning News*, 22 S.W.3d 351, 356 (Tex. 2000); *see* TEX. R. CIV. P. 166a(c). We review the summary judgment evidence presented by both parties, determine all questions

[2] State Farm's declaratory judgment action was brought solely against Lopez, not Ramirez. But apart from its argument that the trial court erred in concluding that Lopez's vehicle was in "use," as required for the policy for State Farm to be obligated to defend Ramirez's suit, State Farm does not raise any complaint about the propriety of the summary judgment granted in favor of Jimenez. We will assume, without deciding, that Ramirez's summary judgment motion was properly before the trial court and address the motion on the merits. *See* TEX. R. CIV. P. 166a(a), (b).

presented, and render the judgment that the trial court should have rendered or remand the cause if neither party has met its summary judgment burden. *City of Garland*, 22 S.W.3d at 356; *see Mid-Continent Cas. Co. v. Global Enercom Mgmt., Inc.*, 323 S.W.3d 151, 153–54 (Tex. 2010) (per curiam).

In reviewing a declaratory judgment, we refer to the procedure for resolution of the issue at trial to determine the applicable standard of review on appeal. *See* TEX. CIV. PRAC. & REM. CODE ANN. § 37.010; *English v. BGP, Int'l Inc.*, 174 S.W.3d 366, 370 (Tex. App.—Houston [14th Dist.] 2005, no pet.). Here, because the trial court resolved the declaratory judgment issue on competing motions for summary judgment, we review the propriety of the trial court's grant of the declaratory judgment under the same standards applicable for review of summary judgments noted above. *English*, 174 S.W.3d at 370.

III. APPLICABLE LAW

Texas courts broadly define "use" of a motor vehicle in the context of insurance policies. *Global Enercom Mgmt.*, 323 S.W.3d at 156; *Farmers Ins. Exch. v. Rodriguez*, 366 S.W.3d 216, 226 (Tex. App.—Houston [14th Dist.] 2012, pet. denied). It is a general catchall designed and construed to include all proper uses of the vehicle. *State Farm Mut. Auto. Ins. v. Pan Am. Ins.,* 437 S.W.2d 542, 545 (Tex. 1969); *Rodriguez*, 366 S.W.3d at 226; *Lyons v. State Farm Lloyds & Nat'l Cas. Co.*, 41 S.W.3d 201, 205 (Tex. App.—Houston [14th Dist.] 2001, pet. denied). "Use" means "to put into action or service; to employ for or apply to a given purpose." *Rodriguez*, 366 S.W.3d at 226 (citing *LeLeaux v. Hamshire-Fannett Indep. Sch. Dist.*, 835 S.W.2d 49, 51 (Tex. 1992)). The "use" of a vehicle may include the "loading and unloading" of the vehicle even when those terms are not specifically included in the policy. *See Rodriguez*, 366 S.W.3d at 224–25; *see, e.g.*, *Panhandle Steel Prods. Co. v. Fidelity Union Cas. Co.*, 23 S.W.2d 799, 801–02 (Tex.

App.—Fort Worth 1929, no writ) (concluding that passerby's injury which occurred after iron beam was unloaded from truck and was being carried across sidewalk resulted from use of the truck); *see also Travelers Ins. v. Employers Cas. Co.*, 380 S.W.2d 610, 612 (Tex. 1964) ("'[L]oading and unloading' embrace, not only the immediate transference of goods to or from the vehicle, but the 'complete operation' of transporting the goods between the vehicle and the place from or to which they are being delivered."); *Home State Cty. Mut. Ins. v. Acceptance Ins.*, 958 S.W.2d 263, 266 (Tex. App.—Amarillo 1997, no pet.); *EMCASCO Ins. v. Am. Int'l Specialty Lines Ins.*, 438 F.3d 519, 525 (5th Cir. 2006). Moreover, the intent to exclude coverage must be expressed in clear and unambiguous language. *Nat'l Union Fire Ins. Co. of Pittsburgh, Pa. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991); *Rodriguez*, 366 S.W.3d at 225–26.

The Texas Supreme Court considered the following factors "helpful in focusing the analysis" of whether an injury falls within the "use" of an automobile when reviewing an automobile insurance policy: (1) the accident must have arisen out of the inherent nature of the automobile; (2) the accident must have arisen within the natural territorial limits of an automobile, and the actual use must not have terminated; and (3) the automobile must not merely contribute to cause the condition which produces the injury, but must itself produce the injury. *Mid–Century Ins. Co. of Tex. v. Lindsey*, 997 S.W.2d 153, 157 (Tex. 1999); *see also Superior Crude Gathering, Inc. v. Zurich Am. Ins.*, No. 13-13-00235-CV, 2014 WL 3802651, at *7–9 (Tex. App.—Corpus Christi–Edinburg July 31, 2014, no pet.) (mem. op.). The Court, however, qualified its endorsement of this test by noting that it did not consider the three factors to be an "absolute test" and that the three factors were "unavoidably abstract." *Lindsey*, 997 S.W.2d at 157. The third factor, in particular, was "especially troublesome because of the difficulty in many circumstances of deciding what

role a vehicle, as opposed to other things, played in producing a particular injury." *Id.* However, the Court found that the third factor did not "create this difficulty . . ., but simply expose[d] it in the arising-out-of-use test for coverage" and acknowledged that the "degree of the vehicle's involvement in the production of the injury is a difficult factor to judge." *Id.* at 158. The Texas Supreme Court has since clarified the causation required by this third factor, stating that "to invoke coverage the vehicle's use must be a producing cause or cause in fact of the accidental injury." *Lancer Ins. v. Garcia Holiday Tours*, 345 S.W.3d 50, 56–58 (Tex. 2011). "To be a producing cause of harm, the use must have been a substantial factor in bring[ing] about the injury, which would not have otherwise occurred." *Id.* (citing *W. Invs., Inc. v. Urena*, 162 S.W.3d 547, 551 (Tex. 2005)).

IV. ANALYSIS

By its sole issue, State Farm argues the trial court erred when it found that the language in Lopez's automobile policy with State Farm provided coverage in Ramirez's suit. The parties did not dispute the relevant facts needed to determine whether the policy provided coverage: Lopez drove a truck to pick up a shipment at Fite Farms and is alleged to have failed to properly secure the gate while exiting, which allegedly led to the cows roaming on the highway and Ramirez's collision.

We need not address the first or second factor set out in *Lindsey*—the inherent nature of the automobile and its territorial limits—because even assuming those two factors support a finding of use, we still conclude, as discussed below, that the third factor cannot be satisfied. *See* TEX. R. APP. P. 47.1. As noted, the third factor is a causation analysis. *Global Enercom Mgmt.*, 323 S.W.3d at 155; *see Lancer Ins.*, 345 S.W.3d at 54 ("[W]e have said that a covered liability under the auto policy required some causal connection 'between the accident and the use of a motor vehicle.'" (quoting *Lindsey*, 997

S.W.2d at 157)); *Rodriguez*, 366 S.W.3d at 228. Whether this causal relationship exists between the use of the gate as part of the loading and unloading of the truck and Ramirez's collision with the cattle is the dispositive issue before this Court.

Here, the gate in question could have been left open even if Lopez's truck was not involved. *See State & Cty. Mut. Fire Ins. v. Trinity Universal Ins.*, 35 S.W.3d 278, 282 (Tex. App.—El Paso 2000, no pet.) ("Ms. Evans was not struck by or pushed from the [van], she did not fall from it, and she was not injured in it. As tragic as the instant case is, because Ms. Evans was struck by an unrelated, third-party vehicle while fleeing [the] stopped van to escape a criminal assault, the third prong of the [*Lindsey*] test is not met."); *cf. Global Enercom Mgmt.*, 323 S.W.3d at 156 ("Global asserts that it was the defective rope, not the truck, that caused the injuries, but the rope would not have broken if the truck was not used to hoist the headache ball."); *Rodriguez*, 366 S.W.3d at 228 ("The accident did not merely happen near the trailer: [the individuals unloading the deer stand] could not have accomplished the same result without presence of the trailer, and . . . the use of a trailer includes unloading materials."); *Austin Indep. Sch. Dist. v. Gutierrez*, 54 S.W.3d 860, 866–67 (Tex. App.—Austin 2001, pet. denied) (concluding that a girl's injuries, which occurred when she was hit by a car and killed, arose out of the use of the school bus when the bus driver took "the affirmative action of honking the horn" signaling the girl she could cross the street). In other words, a negligent actor could be standing still and accomplish the same result without a vehicle's involvement. *See Global Enercom Mgmt.*, 323 S.W.3d at 156; *Whitehead*, 988 S.W.2d at 745 ("[W]hen the injury complained of is purely incidental to the use of a vehicle, this nexus is not shown and the policy does not provide coverage."); *Home State Cty. Mut. Ins. v. Binning*, 390 S.W.3d 696, 699 (Tex. App.—Dallas 2012, no pet.) ("The assailant could have been standing in the convenience

store parking lot and accomplished the same result."); *cf. Global Enercom Mgmt.*, 323 S.W.3d at 156 (concluding that the rope attached to the truck would not have broken causing injuries if the truck had not been used to hoist headache ball with the rope); *Rodriguez*, 366 S.W.3d at 228; *see also Superior Crude Gathering*, 2014 WL 3802651, at *7–9 ("[T]he 'auto' must not merely contribute to cause the condition that produces the injury; it must produce the injury."); *Imperium Ins. v. Unigard Ins.*, 16 F.Supp.3d 1104, 1117–18, 1122 (E. D. Cal. 2014) (concluding, under California law, that there was no causal connection between injuries suffered from a gate being left open and the use of the truck that led to the gate being left open because, "[t]hough the truck played a role in the chain of events, it was neither a predominating cause nor substantial factor in the injury suffered"). Therefore, we conclude that the use of the gate here was incidental to the use of the vehicle and merely furnished a condition (the unlocked gate) that made the injury by the presence of the cows in the highway possible; thus, but for causation is not present. *See Lancer Ins.*, 345 S.W.3d at 57; *Lindsey*, 997 S.W.2d at 15; *Urena*, 162 S.W.3d at 551 (noting that cause in fact does not exist when the act merely furnishes a condition making the injury possible). As such, Ramirez's accident did not result from Lopez's "use" of the covered vehicle as a matter of law.

Ramirez's motion for summary judgment argued that the "complete operation rule" meant that the use of the gate was part of the "loading and unloading" of the shipment, which brought the activity under the term "use" of a vehicle for purposes of the policy. *See Travelers Ins.*, 380 S.W.2d at 612 (adopting the "complete operation rule" in Texas). Ramirez then cited a pre-*Travelers* case from the United States Fifth Circuit Court of Appeals, which interpreted Texas law and provided that:

> the theory adopted in Texas and generally known as the 'complete operation theory,' holds that the provision for use coverage extends to foreseeable consequences of what was done in connection with the use of the car, whether before, after, or during loading or unloading, so long as the act or [thing] done by the insured's employee which causes the accident arises out of the use of the insured's car.

See Red Ball Motor Freight, Inc. v. Emp'rs Mut. Liability Ins. Co. of Wis., 189 F.2d 374, 375 n.1, 377–78 (5th Cir. 1951) (extending automobile insurance coverage for explosion and fire that occurred after pump used to fuel truck in preparation for journey was not closed properly). First, we note that the Fifth Circuit's interpretation of Texas law is not binding on Texas courts. *See Harris County v. Coats*, 607 S.W.3d 359, __ (Tex. App.—Houston [14th Dist.] 2020, no pet.); *Stanley v. Reef Sec.*, 314 S.W.3d 659, 677 n.4 (Tex. App.—Dallas 2010, no pet.). Second, regardless, we believe *Red Ball* is distinguishable from the case at hand when analyzed through the subsequent Texas Supreme Court precedent, which we are obligated to follow. Unlike Lopez's use of the gate at issue here, the use of the gas pump in *Red Ball* was essential for the operation of the truck in that case, and *Red Ball* did not involve "loading and unloading." *See Lindsey*, 997 S.W.2d at 156 ("The use required is of the vehicle *qua* vehicle, rather than simply as an article of property."); *Home State Cty. Mut. Ins.*, 958 S.W.2d 263 at 267 ("*Red Ball Motor Freight* is not controlling because (1) the loading and unloading of the cargo was not involved [and (2)] it predates the *Travelers* decision which approved and adopted the 'complete operation' rule for the loading and unloading of cargo"); *see also Red Ball Motor Freight*, 189 F.2d at 375 n.1, 378 (Russell, J., dissenting) ("Thus the application of the principle in [*American Employers' Insurance Company v. Brock*, 215 S.W.2d 370 (Tex. App.—Dallas 1948, writ ref'd n.r.e.)], in the present case, results with the announcement of the theory,

in effect, that acts done 'in preparation for use' should be treated as within the coverage of the policy.").

Ultimately, applying the precedent of the Texas Supreme Court and taking into consideration the opinions of our sister appellate courts, we find that the "complete operation rule" does not change the conclusion, as discussed above, that the use of the gate was incidental to the use of the vehicle and merely furnished a condition that made the accident possible. *See Lancer Ins.*, 345 S.W.3d at 56 ("We cautioned in *Lindsey*, however, that not every injury capable of connection to the use of an auto is covered use."); *Lindsey*, 997 S.W.2d at 157 ("[T]he automobile must not merely contribute to cause the condition which produces the injury, but must itself produce the injury."); *Whitehead*, 988 S.W.2d at 745 ("[W]hen the injury complained of is purely incidental to the use of a vehicle, this nexus is not shown and the policy does not provide coverage."); *cf. Red Ball Motor Freight*, 189 F.2d at 375 n.1, 377–78 ("[F]ueling the truck for the journey was just as much a 'use' of it [as] making the journey would be.").

We sustain State Farm's sole issue.

V. CONCLUSION

We reverse the trial court's judgment and render judgment in favor of State Farm declaring that it owes no duty to Lopez in Ramirez's suit because Ramirez's accident did not result from Lopez's use of his truck.

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DORI CONTRERAS
Chief Justice

Delivered and filed the
24th day of November, 2020.