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Supreme Court of Texas.
Lancer Insurance Company
v.
Garcia Holiday Tours, Louis Garcia, Raul Garcia, Oscar Perez, II, Danielle Calhoun, Adriana Riojas, Juan Gabriel Gonzalez, Marisol Salazar, Raul Guerra, Jr., Maria E. Guerra and John A. Vela, Jr.
No. 10-0096.

January 4, 2011.

Appearances:

E. Thomas Bishop of Bishop & Hummert, P.C., for petitioner.

David George of Connelly Baker Wotring, LLP, for respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Dale Wainwright, David M. Medina, Paul W. Green, Phil Johnson, Don R. Willett, Eva M. Guzman, and Debra H. Lehrmann, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: Be seated, please. The Court is ready to hear argument in 10 matter 96, Lancer Insurance Company versus Garcia Holiday Tours and others.

MARSHAL: May it please the Court, Mr. Bishop will present argument for the Petitioner. Petitioner has reserved five minutes for rebuttal.

ORAL ARGUMENT OF E. THOMAS BISHOP ON BEHALF OF THE PETITIONER

ATTORNEY E. THOMAS BISHOP: May it please the court. Does a business automobile insurance policy cover tuberculosis? In the course of over a quarter of a century of handling literally thousands of transportation claims, the people at Lancer Insurance Company not only had never had such a claim, they'd never heard of such a claim and there's probably a good reason for that. One of the things that the lawyers in this case all agree upon and the Court of Appeals even noted is that there is no reported case, not one, holding that a business auto policy covers tuberculosis.

CHIEF JUSTICE WALLACE B. JEFFERSON: Why would it cover a bullet or why would it cover a child in a hot car? I mean these are very kind of esoteric questions here.

ATTORNEY E. THOMAS BISHOP: And I hope that the chart we have presented to the Court helps answer that question. That brings us to, Chief Justice Jefferson, the analysis that is set forth in Mid-Century v. Lindsey, which is one of the cases that you talked about and it also brings us to the analysis in the Aisha's Daycare Center case. Most recently, this court's analysis of the factors to determine use coverage was found in the Global Enercom case. And the simple answer to your question is this. When we deal with a non-traditional use, it's clear that buses get involved in accidents, sometimes individuals get hurt entering on to or alighting from buses, but when it comes to something a bit more esoteric, as you described, like a gunshot wound or a suffocation incident, then we have to apply essentially three tests, three factors, three questions that have to be asked and have to be answered in favor of the plaintiff before there can be a recovery on the insurance policy. And the first one is did the accident arise out of the inherent nature of the auto, in this case a bus, as such? Members of the Court, there's nothing about a bus that's inherent with tuberculosis.

JUSTICE PAUL W. GREEN: What was the accident? What was the accident?

ATTORNEY E. THOMAS BISHOP: Good question. I think that the allegation was that the driver accidentally infected persons with tuberculosis. And, of course, you're going to say but where was that traceable to a specific date, time and place. It's not. But assuming that there is such a thing as an accidental infection with tuberculosis, a bus may well be a conduit. I don't dispute that and I think we'll see a factor in just a moment that tells us why being a conduit is not enough, but frankly so is your office, so is a classroom, so is a Subway restaurant.

JUSTICE DAVID M. MEDINA: Yeah, but perhaps your procedures engaged so that when you make a hire that the person is medically tested to make sure he doesn't have an infectious disease and as I understand, that wasn't done here.

ATTORNEY E. THOMAS BISHOP: Good point, excellent point. And that, Justice Medina, is a classic general liability insurance policy risk. Remember, this is a transportation insurance risk. This doesn't cover that. And as you'll see in a few moments, this company really didn't have general liability insurance. They instead purchased a very limited premises liability policy in Corpus Christi that did not cover any of the actions of their employees, including making people sick.

JUSTICE DEBRA H. LEHRMANN: Well let me ask you, the passengers have argued that the bus's air conditioning system made it easier for the virus to spread around the bus. Now how can you, I mean if that's true, didn't it result from the use of the vehicle.

ATTORNEY E. THOMAS BISHOP: It did not and two reasons. I started with a factor where I said look, there are things that are inherent in a bus that are dangerous. Carbon monoxide poisoning is one of them. I've defended those cases, but not tuberculosis. Buses don't have tuberculosis. They can't in and of themselves create tuberculosis. They can't in and of themselves infect with tuberculosis and what's critical about the question that you answer or that you asked, Justice Lehrmann, and I'll try to answer is this, one of the additional factors that we have to satisfy as a result of the Mid-Century v. Lindsey test is this: the bus must not merely contribute to cause the condition which produces injury, an air conditioning system which allows the tubercular germs to be circulated through the bus. It must not merely contribute to cause the condition which produces the injury, but it must itself produce the injury. And Justice Hecht ruled quite clearly on behalf of the majority of the Court in the Mid-Century v. Lindsey case that if the incident could have occurred, the infection with tuberculosis could have occurred, regardless of the vehicle, the Court seemed to be consistent in holding there is no coverage under a vehicle liability policy. And we know, we know from the record that not only were there instances where these people were not in a vehicle. Remember this is a two-day trip. They're on the bus for a couple of hours going from Alice to Corpus Christi -- to Santa Fe -- San Antonio Fiesta and two hours going back, but there was constant interaction with this driver outside of the bus. The actual record in this case demonstrated just in the case

of a couple of individuals. Maria Guerra said the only time she ever noticed the bus driver was when they were at the mall.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, the Court of Appeals noted all of that, but said there's a fact issue about whether some of these passengers contracted the disease on the bus or outside and that you didn't certainly conclusively establish that the transmission occurred outside the bus. What do you say to that?

ATTORNEY E. THOMAS BISHOP: Well it clearly occurred outside of the bus or some of it occurred outside of the bus in at least three different persons, Maria Guerra, Mrs. Marisol Salazar, who saw the bus driver at the hotel, was coughing in a cell phone and her boyfriend heard it on the other end. And in the case of an individual by the name of Danielle Calhoun, again outside of the bus, saw the driver smoking and coughing.

CHIEF JUSTICE WALLACE B. JEFFERSON: There was no question that there was interaction outside the bus, but did you conclusively establish that any tuberculosis that the Plaintiffs claim that they had was contracted outside of the bus and not inside, conclusively?

ATTORNEY E. THOMAS BISHOP: Well there's two answers to that and one of them I'm going to defer on because it deals with the duty to defend rule and the pleadings precluding, but this was a no-evidence motion for summary judgment in addition to a traditional evidence and the burden to establish coverage, Chief, falls upon the plaintiff. It is their obligation to show not that it could have happened, but it did happen not only on the bus, but because of the bus. And I challenge all the members of the Court to take this bus driver, this fellow traveler, off the bus and use any other driver.

JUSTICE DAVID M. MEDINA: Well he's not a fellow traveler. He wouldn't be on that bus, but for his employment with the bus line.

ATTORNEY E. THOMAS BISHOP: He was. And there's no allegation that he did anything wrong on the operation of that bus. I mean --

JUSTICE DAVID M. MEDINA: Let me ask you this. You say this is covered by a premises liability policy?

ATTORNEY E. THOMAS BISHOP: No, no, a general liability policy.

JUSTICE DAVID M. MEDINA: CGL. Okay, if this bus has asbestos in it during its manufacture or placed in later and these passengers or passenger later got mesothelioma or asbestos-related disease, would there be coverage on a duty to defend in that issue.

ATTORNEY E. THOMAS BISHOP: I think there could be. Where the bus is transformed, as we've seen in these cases involving kitchens in buses or if you, the case that you cited of asbestos used to heavily coat the bus, then that becomes a risk inherent in the bus itself, but you see, tuberculosis just doesn't work that way its --

JUSTICE DAVID M. MEDINA: By placing a driver that may have had tuberculosis, how's that any different. You're putting, you're making an addition to the bus and that addition here is the driver.

ATTORNEY E. THOMAS BISHOP: Well the difference is, Justice Medina, the driver in and of himself certainly can infect people, but that's not a transportation risk. That's something that we're all exposed to. I'm exposed to in this particular room and when we're talking about how is this insured, this being an auto liability policy, in this case a bus liability policy, the third prong of that test says we don't just, it's a hard prong, let me be blunt with you, but it's supposed to be hard. It says the bus itself must produce the injury and I submit to the Court that this driver could have been standing still as was the case in the drive-by shooting cases or the driver could have been anywhere and infected these people, but not the bus. And again, Mr. Chief Justice, coming back to your question, there are incidents and this chart I think fairly well demonstrates the incidents that dem-

onstrate where there is, in fact, no coverage. When you get above this red line, there simply is no coverage and the first analysis is under the National Union v Merchants case and the Farmers case v Griffin where the Court just looked at the pleadings, looked at the pleadings themselves and said you know there's no allegation here of facts showing a causal connection between the bus as a vehicle inherently dangerous because of this reason or that and the actual injury and that's the case here. When you look back at the actual pleadings in this case, it talked about, Justice Medina hit one of those points well, they failed a screening. Well that's fine. That's a pretty clear premises liability or excuse me, a general liability risk. The driver was negligent in infecting the people. Well, critical in that analysis is it doesn't say the bus was involved in infecting the people. This is not about a sick bus; it's about a sick driver and there is a substantial difference between the two. There is another prong of that test, Chief Justice Jefferson, and that's the middle prong. Now remember, the plaintiffs have the initial burden to prove that there is coverage. To bring forth evidence that there is, in fact, coverage. And that second prong says the accident must have arisen within the natural territorial limits of the auto and the actual use must not have terminated. We've already covered at least half of the people in that bus who remarked about not incidents on the bus, but contact outside of the bus where this particular driver was coughing in their presence and they feared about to make them sick. But the critical analysis that we keep coming back to is and under Midcentury, had it not been for that gun in the gun rack at an entry point that was loaded, apparently without a safety, there's no question there would not have been an incident. In the case of Aisha's Learning Center, had it not been for that vehicle and we all know an inherent risk of a vehicle in the summer when you close it up in the hot sun is it can suffocate people. And if you leave a child or a pet inside that vehicle, the vehicle itself causes the injury. It doesn't merely contribute to cause the injury as that third prong of the Midcentury test tells us.

JUSTICE PAUL W. GREEN: Why is the rifle like the bus driver?

ATTORNEY E. THOMAS BISHOP: I don't think it is like the bus driver; that's a simple answer to your question. A rifle as a loaded instrument can make a bus very dangerous.

JUSTICE PAUL W. GREEN: Right, but you introduce it into the vehicle just as the driver was introduced into this bus, that carries a risk inherent with bringing that person or that rifle into the vehicle. It seems kind of similar to me.

ATTORNEY E. THOMAS BISHOP: I'm not here to tell you that these people can't recover from the driver. I'm not here to tell you that these people can't recover from the tour bus company.

JUSTICE PAUL W. GREEN: There's no recovery against a rifle either, that's my point.

ATTORNEY E. THOMAS BISHOP: But I am here to tell you there's no recovery under a business auto policy because the causal connection is just too thin. It stretches the line way too far. The pet case. A dog bite in a car. Well, if it wasn't for the dog being introduced into the car, the fellow wouldn't have gotten bit. The Court says no, that can happen anywhere. Aisha's, this whole subject of it getting so hot. The Court says that can't happen in a park or a classroom. Tuberculosis can.

JUSTICE NATHAN L. HECHT: You began by saying that there weren't any reported cases like this. Is that in the country?

ATTORNEY E. THOMAS BISHOP: Yes.

JUSTICE NATHAN L. HECHT: Because I'm struck by the briefs didn't cite any other cases and, frankly, one of the important factors in Lindsey was that the majority of the case law wasn't unanimous, but it was substantial, favored coverage in that case and it doesn't seem like it ought to make any difference whether you're covered if you're shot in Oklahoma or you're shot in Texas or shot in New York. I mean there's some argument to be made that it ought to be fairly standard around the country and that was the last argument made in Lindsey, but it was an important one, but there are just not any cases like this in the country?

ATTORNEY E. THOMAS BISHOP: No there's none and we've handled thousands of transportation claims. And I think that's another reason. But if you have doubts, take a look further at this chart because when the Lindsey case was decided, you'll find that there are, the efforts of this young man to enter the vehicle directly caused the incident. Now it wasn't about these people entering on to and off of the vehicle unless we're prepared to say that merely breathing on a vehicle is sufficient to give rise to liability under a business auto policy. The only result we can reach is that this matter should have been reversed and rendered. I have minimum, a minimum amount of time remaining and I'm not going to try to cover everything in that time. I do want to mention one thing. Justice Wainwright has left us and I think he ruled correctly in the Markel v D. R. Horton case that just because you have no duty to defend doesn't mean that there is automatically no duty to indemnify. But the cases still exist where there are no circumstances that can create a duty to defend under the facts, not the legal conclusions of negligence or it happened in a car as a result of the use of a car. Then that doctrine is viable and we respectfully submit to the Court that one of the reasons duty to defend was so important in this case and never properly ruled upon by the trial judge or the Court of Appeals was if you just get to the basics and look at this policy, you have to come to conclusion there was never a duty to defend triggered and for that reason as well, there is no duty to indemnify. I'll reserve the balance of my time.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Bishop. The Court is ready to hear argument from the Respondents.

MARSHAL: May it please the court, Mr. George and Mr. Chapman will present argument for the Respondents. Mr. George will open with the first 12 minutes.

ORAL ARGUMENT OF DAVID GEORGE ON BEHALF OF THE RESPONDENTS

ATTORNEY DAVID GEORGE: May it please the court. Lancer claims that an auto policy can never cover liability for a bus driver negligently transmitting a communicable disease to a passenger. But the auto policy that Lancer issued, specifically insured liability for disease that resulted from the use of the auto. Just three months ago in Global Enercom, this Court reaffirmed that use of an auto is defined broadly, both in auto insurance policies and in commercial general liability policies. And this Court has found use of an auto caused an injury in circumstances that are far removed from the typical auto accident.

JUSTICE NATHAN L. HECHT: Do you think it makes any difference whether it was the driver or passenger?

ATTORNEY DAVID GEORGE: I think it would make the difference in the sense of whether there would be liability to a certain extent.

JUSTICE NATHAN L. HECHT: Why is that?

ATTORNEY DAVID GEORGE: Well I think the bus, in this case, the bus driver knew he was sick. He didn't know what he had. He knew he was sick and he went forward. That was negligent. It seems harder to find cases where a bus company would be liable for a bus passenger negligently transmitting a disease.

JUSTICE NATHAN L. HECHT: Why, if it's vehicle insurance and you -- it was just pass -- maybe the chaperone had this same latent disease or it could be anybody, but one person got it from another.

ATTORNEY DAVID GEORGE: Well, I think we step back and the policy says it will pay if Garcia Holiday Tours or the other insureds are legally obligated to pay. Here there are two insureds, the company and the bus driver, in addition, is an insured. They were sued for negligently allowing the transmission of the disease.

JUSTICE EVA M. GUZMAN: But what if it was a passenger and they knew that the passenger had a commu-

nicable disease, would there be liability in those circumstances?

ATTORNEY DAVID GEORGE: There may be. I think in that case if a bus company was negligent in allowing a passenger who [inaudible] a person came and says I'm very sick, but I still want to get on the bus and they allowed that, they may then have been held liable civilly and there may be insurance, but I think that if we're looking at the relationship, I think that is a more difficult question, but I think it's much easier when as here I think it was Justice Medina pointed out the, you know the bus driver is different fundamentally than a passenger. The bus driver is in some ways like part of the bus. He has to have specific licenses. The bus doesn't move without him just like you have to you know have wheels and gasoline, you have to have a bus driver. So he is much more integral in a way, but I don't think.

JUSTICE NATHAN L. HECHT: I suppose it doesn't make any different that it was a bus; it could have been a car.

ATTORNEY DAVID GEORGE: Yes.

JUSTICE NATHAN L. HECHT: So if Justice Green invites me to lunch and he's sick and I get sick, I might have a claim.

ATTORNEY DAVID GEORGE: I think arguably one could. If the relationship is that the use of the auto causes the injury.

JUSTICE NATHAN L. HECHT: Then if that's true, it seems odd that there wouldn't be any cases on this anywhere.

ATTORNEY DAVID GEORGE: There's no cases one way or the other. There's no cases, to be honest I was very surprised when I first read Lindsey at the plethora of cases on the shootings. There is really, yes, Justice Lehrmann

JUSTICE DEBRA H. LEHRMANN: I just wanted to ask you a little bit about the cases because we're getting into that area. You know there are cases throughout the country, some jurisdictions that treat the phrase resulting from differently than the phrase arising from. And can you point us to any cases that treat those two phrases the same and fail to distinguish?

ATTORNEY DAVID GEORGE: Yes, there are cases on both sides of that issue and I think that we definitely have -- We have the --

JUSTICE DEBRA H. LEHRMANN: Well what I'm asking about is the ones that failed to distinguish.

ATTORNEY DAVID GEORGE: I'm sorry that --

JUSTICE DEBRA H. LEHRMANN: Can you point us to cases that treat the two phrases the same?

ATTORNEY DAVID GEORGE: Yes, give me one -- We covered this in our brief around page 29. Your Honor, actually it's, off the top of my head, I don't remember the names. It's discussed actually in the brief for both the amicus of the insurance company and of the Lancer's brief; they recognized both and list the cases. There's one from Florida, for example, that showed that they are no different.

JUSTICE DEBRA H. LEHRMANN: And if there's, and if you review that and see that it's not sufficient, would you supplement that please?

ATTORNEY DAVID GEORGE: Oh yes, Your Honor. I think what we have is there's no question we have cas-

es on both sides. Cases say resulting from means the same as 'arising out of.' Cases say that they mean different things. But we also have Couch, which is one of the premier treatises, which says they mean the same thing. I think that leads to a conclusion that it is ambiguous. When this many commentators on both sides can't agree on what words mean, that's good indication that it's susceptible to two meanings. When it's susceptible to two meanings, we have an ambiguity and we go with the interpretation that leads to more coverage. In addition, I don't think that it matters in this case. What this Court has held before is that resulting, that 'arising out of' means that there is cause in fact or but for. That means that it would not have happened without it plus it's a substantial factor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Well then let's say I'm not a passenger on the car, the bus driver has tuberculosis and he infects a passenger on the bus and then that passenger infects me and I sue the corporation and the bus driver. Is there a duty to defend and indemnify on behalf of the insurance company in a case like that?

ATTORNEY DAVID GEORGE: If I understand it --

CHIEF JUSTICE WALLACE B. JEFFERSON: I'm indirectly exposed. The bus driver exposes a passenger. I'm sitting in a building 10 miles away when the passenger comes and visits me and that's how I get my exposure. Is that the use of a motor vehicle in such that the company would have insurance coverage?

ATTORNEY DAVID GEORGE: I think that probably is getting a lot closer to the line and may go over because of the two areas. One is a substantial factor. You have to be, for both arising out of and resulting from, it'd have to be a substantial factor. The causal change cannot be too attenuated and we obviously we don't use the but for this, you know this wouldn't have happened and that wouldn't have happened and that wouldn't have happened.

CHIEF JUSTICE WALLACE B. JEFFERSON: You'd conceded then that any passengers that were infected outside of the bus would have no, there would be no coverage for those lawsuits.

ATTORNEY DAVID GEORGE: Well, two points on that, Your Honor. One is the only, there's evidence of three passengers having seen him cough outside the bus. Nothing about them at a hotel seeing him. It was all on the outside when they were waiting to get on or get off, which I think would still be you know the loading, alighting and that kind of thing would be within the use. Second, that maybe we have the evidence that the passengers were on the bus, the Texas Department of Health says that's where they got the tuberculosis on the bus trip. That we may have a fact issue that the Court of Appeals determined we did not conclusively establish that it was on the bus they got it. There was a fact issue and we'll have a jury and perhaps people will testify and the jury will determine did they get it only off of the bus. If that were the case, you know depending. I think that one could say even if it was not on the bus, but it was while waiting to get on or off while putting packages on or off, which is what the testimony was, we'd have coverage. If the evidence, if the jury were to believe that it was not during the time they were enclosed in a tube re-circulating air, breathing the air from the infected driver for hours and hours, but instead it was while passing briefly in the restaurant, I would agree at that point there would be no coverage. But we have a fact issue, we asked the jury about that. And I think one point that was asked earlier about what was the accident. You know what is the accident? I think there's several points to that. One is that's an issue that the amicus insurance company group raised. That is not an issue in this case. It has been conceded that this was an accident. It has been repeatedly conceded that this was an accident so there -- and the accident is the -- and the accident is the.

JUSTICE DON R. WILLETT: Because it was the exposure to the conditions.

ATTORNEY DAVID GEORGE: The negligent transmission of tuberculosis from the driver so that's not, no longer an issue. Even if it were an issue, accident has been defined very broadly by this court. For example, in the Farm Bureau v Sturrock case, a person got out of a car, caught his ankle on the door frame and fell and this

Court determined that was an accident. So we have it as a very broad. And then I think if we also look at the issue of the Lindsey and the rifle and how that applies. I think that Lindsey is much more attenuated relationship than we have in this case. Because in Lindsey, this Court made clear it was not the movement of the truck that caused it. What we have is a truck is sitting still, a gun which is a piece of personal property attached, not a fixture, is put there. A boy climbs through the back window and jars the gun and it fires and it hits someone not even in that vehicle, but several vehicles over. The Court made clear in Justice Hecht's opinion that obviously there would be more causal relationship if the movement of the truck itself --

CHIEF JUSTICE WALLACE B. JEFFERSON: But you just said that there would be coverage if the passengers got tuberculosis while loading on the vehicle.

ATTORNEY DAVID GEORGE: Yes.

CHIEF JUSTICE WALLACE B. JEFFERSON: While the bus driver's outside the vehicle. The air conditioner is not even moving, so --

ATTORNEY DAVID GEORGE: Well I think that's still related to the use of the vehicle. I still, I think it's the inherent nature. But even if we set those aside, I think there's no evidence that that was the only contact. Those people who said they were off of the bus loading and saw him, that wasn't their only contact. They then got on the bus and rode with them, but we don't have anything here. I think here the use of the bus, we have two ways we have the use causing them. One we have the air conditioning system picking up the germs and moving them around and then also we have the closed condition.

JUSTICE NATHAN L. HECHT: But to be clear, if the air conditioner hadn't been working, you would still make a claim?

ATTORNEY DAVID GEORGE: Well two responses to that, Your Honor. One, we have a closed condition and so we think that would be sufficient. Second, I don't know if you would take a bus from South Texas with a non-working air conditioner in May, but it may be that if there were no air conditioner, there would be no tuberculosis for the passengers in the back. But we do have both and it's clear that the air was taken, moved and put back on the passengers. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you Mr. Chapman. Mr. George, Mr. Chapman.

ATTORNEY STEPHEN J. CHAPMAN: May it please the court, I've been trying to write down a few of the answers to the questions you all have been asking, I'm only going to try and give one. What I thought was interesting was your analogy, Justice Green, in regards to the rifle and this cases is sort of about the edges of things because things are made at the edges and not in the middle and one of the edges is the Lindsey case, in that case the rifle. In this case, analogize the bus driver to the rifle, but he's even more integral to the operation of a bus than a rifle would be to the operation of a car and that sort of answers some of the other questions that were being asked as well.

JUSTICE NATHAN L. HECHT: This was a pickup in Texas, now, you understand?

ATTORNEY STEPHEN J. CHAPMAN: I understand. I was say we live in Texas, but in this particular case we have a commercial vehicle that's being operated for transporting passengers and in order to do that, the bus driver has to be commercially licensed, he has to pass certain tests, certain regulations, certain physical tests, all these things because we're a common carrier and perhaps there's not a higher duty, but there are additional laws and additional statutes and if you look at the endorsements to the policy.

CHIEF JUSTICE WALLACE B. JEFFERSON: So you think there would be no coverage in the Hecht-Green scenario or there would?

ATTORNEY STEPHEN J. CHAPMAN: You know and that wa was leaning towards. I tend to think that there may not be coverage in that situation depending on the language of the policy because we always have to go back to that.

JUSTICE NATHAN L. HECHT: The same language, why wouldn't it?

ATTORNEY STEPHEN J. CHAPMAN: In this particular c anyone could drive a regular automobile, your friend could be driving it, your son can get in there, grandma can get in there start it up and drive off. In this particular case, the bus driver was an integral part of the operation of this bus for its intended use. And its intended use was to transport passengers from one destination to another. This particular commercial vehicle requires the presence of a commercially licensed driver. There is a higher level, a higher standard, I would say in effect, for those type of claims. The most analogous case I found, believe it or not, is the Aisha Learning Center case and the reason that's analogous is you have a child in a van, you have an external source, the sun, providing heat and the van amplified that as a van can do or a bus. In this particular case, the van, I'm sorry in that case, the van did not produce the heat, the sun did. In this case, the bus didn't produce tuberculosis, the diver did. The van itself together with the hot sun was the instrumentality of injury, that's what I'm talking about the heat along with the van. Our whole case or the whole case at trial was that the bus re-circulated the air and it concentrated that air within the locus of the bus so that these passengers were exposed and go figure, they all tested positive for TB down the road. And talking about the edges of things, in their brief and in their argument just now, they suggested that if we just purchased a better CGL policy, we wouldn't be here. Well yes we would be here maybe a few months back and the name of this case would be Mid-Continent v Enercom and we'd be arguing about the auto use exclusion and the extent of that. So we've got, in one way if you look at it, we've got Lindsey on one side and that case on the other and where these things fit in the middle. And the Court noted that and all its opinions and what it says is that there's no particular, you know, set of facts that are going to fit into every situation in this three-part test we've been talking about. It's not an absolute test you say in both Lindsey and in Enercom. It's a conceptual framework and I like that language because each one of these cases is decided on its facts. It's not a cookie cutter. I mean Enercom has to be one of the most ridiculous set of facts I've read with the ropes and the pulleys and the things. It sounds almost, if it weren't so tragic, out of a Charlie Chaplin movie or something. But in this case, we have a much more manageable set of facts in that we have an instrumentality in the bus that is required for its operation. Let's imagine, I mean --

CHIEF JUSTICE WALLACE B. JEFFERSON: Mr. Chapman, can I interrupt you. I just want to be real clear on one question. There, the insured did not defend, is that correct?

ATTORNEY STEPHEN J. CHAPMAN: That is correct, Your Honor, and one of the issues I wish to talk about here before my time is up is the duty to defend and having written coverage opinions and looked at things like this before, this is actually a very, very simple analysis. Back when I used to work for Justice Holman, he always taught me to start at the beginning and that's where we'll start. In terms of determining whether or not there's a duty to defend in this case, we have the eight corners rule. In this case, it's actually sixteen corners because there were three petitions and one insurance policy. Two of the petitions I will candidly say are not the best, well-written petitions. They sort of globally cover some issues. But it was the petition in intervention and I can't remember which one, but it's the second one that was filed and I believe it was in April or May of '05 and it specifically alleged that the passenger exposed to this disease in the closed environment of the bus and re-circulated, it particularly raises that issue and it was filed within 30 days of the original petition being filed. And so when you look at that claim and the analysis of what the Lancer policy covers, the Lancer policy will pay all sums and insured legally must pay his damages because of bodily injury or property damage, okay, caused by an accident or resulting from the ownership, maintenance or use of a covered auto. Bodily injury is defined as:. Bodily injury means bodily injury, sickness or disease sustained by a person, including death, resulting from any of these. Defines accident. Accident includes continuous repeated exposure to the same conditions resulting in bodily injury. We have a bodily injury. We have an accident as defined by the policy. Now they want to say it didn't result from the use and well, we've come a long way arguing about use. It seems to me there may be lit-

tle doubt about whether this was in the operation or use category of the vehicle and gee whiz if there's doubt, that gets resolved in my client's favor. And that's the point here in terms of duty to defend is any doubts are resolved in our favor and there's plenty of doubt in this case and there's plenty of things that fit right within the categories of things that would be covered under the policy. Use, arising from, resulting on, that's questionable, but questions are resolved in our favor and that's well-settled law, Your Honors. Finally, I'd like to point out that my clients paid a bunch of premiums for policies that apparently wouldn't cover this under any circumstance and that's the public policy argument. You got to remember it's not just our policy, it's covering our passengers, our common carrier passengers. Under their argument and reasoning, we would have to purchase a tuberculosis policy, okay. I don't think there is one. If there is I'm betting the premiums, well I don't know it's such a rare disease I don't know what the premiums would be, but I'm telling you that doesn't exist as far as I know. So what we have here is a CGL policy that wouldn't cover it because it's an auto use and we have an automobile coverage that won't cover it because it didn't arise from use. Where does that leave everyone in this type of circumstance? And not every circumstance will fit into this analysis. Under your analogy, Your Honor, we're driving Justice Green, it may not fit. It will depend upon the circumstances of every case; that's why you have come up with conceptual framework. Thank you, Your Honors, I appreciate your time.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counselor.

REBUTTAL ARGUMENT OF E. THOMAS BISHOP ON BEHALF OF PETITIONER

JUSTICE DON R. WILLETT: Mr. Bishop I'm looking at the policy language that Mr. Chapman just went over. Pay damages because of, one, bodily injury caused by, two, an accident resulting from ownership, maintenance or use. Are you disputing only the resulting from part of that, not bodily injury part and not the accident part?

ATTORNEY E. THOMAS BISHOP: Well we have to concede that because our policy defining bodily injury also covered sickness that that would be included.

JUSTICE DON R. WILLETT: So bodily injury and as for accident, the exposure, repeated exposure?

ATTORNEY E. THOMAS BISHOP: I think it raises a serious question, but rather than dancing on the head of that pin, we go to the more, I think, simple and direct question was --

JUSTICE DON R. WILLETT: Resulting from?

ATTORNEY E. THOMAS BISHOP: Yeah. And the issue very simply is did this result from the bus or from the sick driver? And you know this Court has a good way of applying common sense and practical reality to its opinions. And at the end of the day, we're here today because these people did not have a real general liability insurance policy. They had what was described in the record a "bare bones premises liability policy" that didn't cover anything, but a small office building in Corpus Christi. They sued the premises liability carrier and they lost on those very grounds. They sued the agent for not getting him the right kind of coverage. We were the leftovers and what we respectfully submit to the court. Justice Lehrmann, I want to take up one point that you raise. First, we submit to the Court that when you applied this simple arising out of test, this three-prong test, tuberculosis is not inherent in buses and the bus itself didn't cause these seven out of a full busload, seven out of a full busload to have tuberculosis. But what's more important than that, our language doesn't just say arising out of. It says resulting from and, Chief, I think you asked the question or maybe it was Justice Hecht, are there cases that talk about the difference. Yes, there are. There's a split of authority. Mr. Couch does not say well the rule is they mean the same. And this court, I submit to you, has gone very far in saying you know words mean something. An apple is not an orange. They're both pieces of fruit, but they're different and resulting from is a more stringent standard according to the 5th Circuit, according to the Missouri courts of appeal and according to the Mississippi Supreme Court, all of which we have cited and what that standard means is this. The injury must be directly and proximately caused by the bus. It's not just a but for a test. It is a this is what did it. And maybe

my mind is too narrow, but I defy someone to say that a bus in and of itself produces and causes tuberculosis.

JUSTICE DAVID M. MEDINA: You just said there was a split of authority, doesn't that fall right into the argument that's being made here that those two terms are ambiguous?

ATTORNEY E. THOMAS BISHOP: No, no I don't think it does. It just says that different states have different ways of viewing things. A lot of the states didn't much like Justice Hecht's opinion in Mid-Century, but as he points out this is Texas and we have a little different way of looking at certain things.

JUSTICE PAUL W. GREEN: How does the higher duty of care of a common carrier fit into this?

ATTORNEY E. THOMAS BISHOP: Well I think it fits in very well with a general liability clause. I mean what if the bus driver raped --

JUSTICE PAUL W. GREEN: I mean, yeah, it's a commercial liability policy. I mean it's obviously a bus company's commercial carrier. So it's a common carrier, which everybody knows has a higher duty to its passengers than an ordinary situation and so that would seem to, the purpose would be to protect passengers from things like illness, about being transported in those vehicles wouldn't you think?

ATTORNEY E. THOMAS BISHOP: Not only do I think, I agree, but it's not a business auto policy risk. It's a standard liability policy risk just like a rape, an assault on a bus. In regards as a state, the rape case that we cited in our brief. There's a lot of things that can happen on a bus, but they're not caused by a bus in and of itself. The bus may be incidental. It may have allowed the incident to happen, but in this case, that's what we have.

JUSTICE PAUL W. GREEN: So a typical passenger getting on to a bus wouldn't have to be concerned about getting tuberculosis by getting on that bus.

ATTORNEY E. THOMAS BISHOP: That's right if the bus company was insured the way 99% of them I defend are insured.

JUSTICE PAUL W. GREEN: But if you did get tuberculosis, it's certainly not their fault.

ATTORNEY E. THOMAS BISHOP: It may be the bus company's fault, it's not the business auto insurer's responsibility. This case should be reversed and rendered. I thank the Court for hearing us and Happy New Year.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Bishop. That cause is submitted. That concludes arguments for this morning and the Marshal will adjourn the Court.

MARSHAL: All rise.

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