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IN THE
SUPREME COURT OF TEXAS
AUSTIN, TEXAS

MID-CONTINENT CASUALTY COMPANY

Petitioner

v.

GLOBAL ENERCOM MANAGEMENT, INC.

Respondent

On Appeal from the Court of Appeal
For the Fourteenth District of Texas

RESPONSE TO PETITION FOR REVIEW

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The issue presented is whether “execution” requires signatures by both parties, or only the named insured, when it is undisputed by the parties that there were performing prior to the and at the time of the accident; and if Mid-Continent’s limited interpretation creates ambiguity..... 1

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RESPONSE TO THE PETITION FOR REVIEW

TO THE HONORABLE TEXAS SUPREME COURT:

Global Enercom Management, Inc. (Global) files this Response to the Petition for Review and respectfully requests the Court to deny the Petition and affirm the judgment rendered by the Fourteenth Court of Appeals.

RESTATEMENT OF THE ISSUES

Rather than climb, three workers jerry rigged a rope and pulley system to hoist themselves up a 280 foot cellular tower in violation of OSHA and customary practices. The rope was run through a pulley system attached to a truck used as a winch in the system. When the workers were hoisted to approximately 80 feet, the rope broke. The trial court and the court of appeals concluded the accident did not “arise out of” the “use” of an “auto” based on the factors established in *Mid-Century Ins. Co. v. Lindsey*, 997 S.W.2d 153 (Tex.1999). The issue presented herein is whether the mere fact that the use of the truck created tension on the rope is sufficient to satisfy the *Lindsey* factors, when it is unknown why the rope broke and there is no evidence the truck caused or contributed to the rope breaking.

Mid-Continent correctly states it issued a commercial general liability and a commercial automobile policy to All States (the employer of the three workers). The policies required any injuries to occur subsequent to the “execution of the contract”; however, these terms were not defined. Prior to the accident, All States signed the contract and returned it to Global, who signed it after the accident. Both All States and Global agree they were operating under the contract at the time of the incident. Under Texas law, one signature and partial performance constitutes execution of a valid, enforceable contract. Now, Mid-Continent seeks to take a position contrary to the contracting parties and contend the policy language required both parties to actually “sign” the contract prior to the accident.¹ However, such an interpretation creates ambiguity as to its meaning, and must be read in a manner which affords coverage.

POINTS NOT CONSIDERED BY THE COURT OF APPEALS

Although both parties presented and argued all three *Lindsey* factors, the court of appeals rendered its opinion solely on the third factor. Mid-Continent focuses on

¹ In *Travelers Ins. Co. v. Chicago Bridge & Iron Co.*, 442 S.W.2d 888 (Tex.Civ.App.-Houston [1st Dist.] 1969, writ ref'd), the Court rejected this argument.

the causation element of the third factor. However, the three factors are intertwined to determine causation. Factor one is not satisfied because the incident did not arise out of the inherent nature of a properly used truck and factor two is not satisfied because the accident did not occur within the territorial limits of the truck. Thus, the factors are relevant to the causation argument and support the court of appeals conclusion. Tex. R. App. P. 53.4.

STATEMENT OF FACTS

Petitioner correctly states the nature of the case. This case involves policy exclusions, to which Mid-Continent stipulates that coverage exists if the exclusions do not preclude coverage.²

1. The Accident and the Involvement of the Truck

There are several statements which must be supplemented or clarified, which are:

The rope was not attached to the front of the truck; rather one end of the rope was attached to a cable spool, and the rope was then run through a pulley attached to the truck, and then through pulleys at the base and top to run it up a 280 foot tower and down the opposite side to a headache ball.³ Without Forster Barnes' knowledge (the All States foreman driving the truck), the three workers attached themselves to the headache ball to catch an easy ride as opposed to climbing the tower as instructed; when Barnes saw them as they rose over the building, he questioned their decision, twice.⁴ Barnes had never seen this system used to lift individuals up a tower.⁵ Barnes confirmed OSHA precludes the use of rope systems to lift workers up a tower.⁶

² CR 1190-1194; CR 1172-1177.

³ CR 1017; CR 734

⁴ CR 723-724; CR 726; CR 1014

⁵ CR 1049.

⁶ CR 1052.

Forster Barnes did not know where the break in the rope occurred and there were no problems or malfunctions with the truck that could have caused the rope to break.⁷

2. The Execution of the Contract

Global contracted all of the work at issue to All States under the Master Subcontract Agreement.⁸ Gladys McClarrinon was authorized to execute contracts for All States.⁹ Upon receiving the contract from Global, Ms. McClarrinon reviewed it, called Irvin Barnes (the owner of All States), and read it to him.¹⁰ Ms. McClarrinon signed the contract with Global on December 27, 2001.¹¹ Ms. McClarrinon confirmed All States intended for the contract to be executed and enforceable upon her signing it; and confirmed that All States and Global were working under the terms of the contract when the accident occurred on January 2, 2002.¹²

Similarly, Scott Vincent, the Vice President of Operations for Global, confirmed that All States and Global were operating under the terms of the Master Subcontract Agreement at the time of the accident.¹³

SUMMARY OF ARGUMENT

The parties presented an agreed statement of facts and argued the three *Lindsey* factors. The court of appeals' opinion is based solely on the third factor. Mid-Continent claims the lower court erred in evaluating causation. However, the issue is not one of

⁷ CR 733.

⁸ CR 767-771.

⁹ CR 765; CR 767-771; CR 775-778; CR 780-781.

¹⁰ CR 765; CR 782-783.

¹¹ CR 765; CR 772; CR 783-784.

¹² CR 765; CR 784.

¹³ CR 786.

law, but rather the application of the *Lindsey* factors to the undisputed facts:

Rather than climb, three workers jerry rigged a rope and pulley system to hoist them up a 280 foot tower in violation of OSHA and customary practices. The rope was run through a pulley attached to the truck which was converted and used as a winch in the system. Unknown to their supervisor, the workers attached themselves to the rope. As they were lifted over a building, the supervisor questioned why they were doing this, twice. At about 80 feet, the rope broke and the workers fell to their deaths.

Mid-Continent contends the use of the truck put tension on the rope, thus causation exists, without regard to how or why the rope broke. There are many elements that put tension on the rope; and the truck was nothing more than the motor that powered an improperly used hoisting system. Causation fails because the reason the rope broke is unknown, and there is no evidence the truck caused the rope to break. Thus, the lower court correctly concluded the deaths of the individuals did not arise out of the use of the truck; rather its use was incidental and remote to the rope breaking.

The lower court failed to evaluate factors one and two; however, they are part of the causation analysis and support its decision. *Lindsey* factor one is not satisfied because it is not the inherent nature of a truck to convert it to a winch and use it in a manner that is contrary to OSHA and customary practices. *Lindsey* factor two is not satisfied as the accident occurred on the opposite side of a building when the workers were 80 feet up a tower, and thus, did not arise within the territorial limits of the truck.

For these reasons, Mid-Continent's Petition for Review should be denied.

ARGUMENT AND AUTHORITY

1. **Response to Points 1-4: The Lower Court Correctly Applied the Third *Lindsey* Factor to Conclude the Truck did NOT Produce the Injury**

The lower court correctly applied the third *Lindsey* factor to the undisputed facts. Mid-Continent contends the lower court applied a reading of *Lindsey* that was too restrictive and improperly dismissed its authority.¹⁴ Mid-Continent contends the proper analysis should have been a factual “but for” causal connection between the use of the truck and the accident.¹⁵ However, examining the facts, applying the *Lindsey* factors and even the “but for” analysis, it becomes clear this is factual issue, not a legal issue.

Mid-Continent summarizes its factual argument as follows:

The All States employee started the truck, placed it in reverse gear, and drove it backward enough to lift the workers some eighty feet in the air. The truck’s movement unquestionably placed the tension on the rope necessary to lift it. The rope could not have broken by itself, but only the movement of the truck that pulled the rope. While the truck was pulling the rope, the rope broke.¹⁶

Mid-Continent then cites to the dissent’s conclusion that the use of the pick-up was beyond ‘mere involvement’ ... the [operation] of the pick-up played a direct role in the chain of events that led to the workers’ deaths.¹⁷ Finally, Mid-Continent contends “but-for” causation requires the truck to be a substantial factor in causing the injury and without it, the accident would not have occurred.¹⁸ Even applying its argument, this issue

¹⁴ See Mid-Continent’s Petition for Review, pg. 13.

¹⁵ See Mid-Continent’s Petition for Review, pg. 15.

¹⁶ See Mid-Continent’s Petition for Review, pg. 14.

¹⁷ See Mid-Continent’s Petition for Review, pg. 15.

¹⁸ See Mid-Continent’s Petition for Review, pg. 14.

is whether the truck was a substantial factor in causing the rope to break.

At the same time, Texas law recognizes that lines must be drawn between immediate and remote causes. Mere conjecture, guess or speculation cannot establish cause in fact.¹⁹ Cause in fact is not shown if the acts of a defendant do no more than furnish a condition which made the injury possible.²⁰ Cause in fact is also not shown when the defendant's conduct is too remotely connected with the injury.²¹

Similarly, as demonstrated in the various cases, the *Lindsey* factors were designed to specifically determine whether an incident arises out of the use of a vehicle, and draw the line between immediate and remote uses and causes. In *Lindsey*, the Court explained, “[f]or liability to “arise out of” the use of a motor vehicle, a causal connection or relation must exist between the accident or injury and the use of the motor vehicle.”²² In *LeLeaux v. Hamshire-Fannett Indep. School Dist.*, a girl jumped from a parked bus and hit her head on the bus.²³ The *Lindsey* Court noted that although a student was injured in a bus, the bus was not in operation; but was parked, empty, with the motor off.²⁴ The Court concluded it was nothing more than where the accident occurred.²⁵ Then, evaluating *Thornton v. Allstate Ins. Co.*²⁶, in which a taxi driver received gunshot wounds in an armed robbery; the *Lindsey* Court concluded the vehicle was merely the

¹⁹ *Doe v. Boys Clubs of Greater Dallas, Inc.*, 907 S.W.2d 472, 477 (Tex.1995).

²⁰ *Id.*

²¹ *Union Pump Co. v. Allbritton*, 898 S.W.2d 773, 775 (Tex.1995), *abrogated on other grounds*, *Ford Motor Co. v. Ledesma*, 242 S.W.3d 32 (Tex.2007).

²² *Lindsey*, 997 S.W.2d at 156, FN 11.

²³ *LaLeaux v. Hamshire-Fannett Indep. School Dist.*, 835 S.W.2d 49 (Tex.1992).

²⁴ *Lindsey*, at 156.

²⁵ *Id.*

²⁶ *Thornton v. Allstate Ins. Co.*, 391 N.W.2d 320 (1986).

situs and had no more than a “but for, incidental, and fortuitous” causal relation with the use of the vehicle because the vehicle was not the instrumentality of the injuries.²⁷ The *Lindsey* Court also discussed *National Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.*²⁸ which concerned a truck driver’s alleged negligent discharge of a firearm from within the truck that struck a passenger in a van traveling alongside the truck.²⁹ The Court concluded that while the defendant was using the truck as a truck, there was not “even a remote causal relationship” between the use and the shooting.³⁰ Similarly, the *Lindsey* Court noted the factors demonstrated a drive by shooting does not arise out of the use of the vehicle because the vehicle’s role is the mere situs of the incident and is minimal as compared to the shooters.³¹

Mid-Continent’s sole causation arguments are the truck put tension on the rope and the rope could not have broken by itself. Yet, ropes are designed to have tension and other factors were required to create the tension: the weight of the workers and the headache ball, securing the rope to the spool of cable, extending the rope through pulleys up and down a 280 foot tower, the condition of the rope, and even gravity. The mere fact that the use of the truck created tension does not mean it caused or contributed to the rope breaking.

In addition, while the actual cause of the rope breaking is unknown, ropes can break for numerous reasons. The facts demonstrate this was the first time anyone

²⁷ *Lindsey*, at 158.

²⁸ *National Union Fire Ins. Co. v. Merchants Fast Motor Lines, Inc.*, 939 S.W.2d 139 (Tex.1997)(per curiam).

²⁹ *Lindsey*, at 156-157.

³⁰ *Id.*

³¹ *Lindsey*, at 157-158.

attempted to raise the workers on the rope, and no testing was performed. Thus, the rope could have broken due to the weight, the condition of the rope or something in the tower could have cut the rope. Regardless, the demonstrates there was no known cause by the truck, and Mid-Continent puts forth no evidence the truck caused the rope to break.

In summary, Mid-Continent's theory is flawed speculation and too remote to constitute causation in light of the third *Lindsey* factor or "but-for" causation. For these reasons, and below, the lower court correctly affirmed the ruling of the trial court.

**2. The Points Not Considered by the Court of Appeals –
Lindsey Factors One and Two**

In *Lindsey*, reviewing the various cases, the Court repeatedly recognized that the failure to satisfy all three factors was fatal to an Insurers' claim that the exclusion precludes coverage.³² Thus, to the extent there was any error, it was the failure of the court of appeals (and Mid-Continent in its Petition) to consider and demonstrate *Lindsey* factors one and two are involved in the causation analysis and support the rulings issued in favor of Global.

a. Factor One: It is NOT an Inherent Nature of a Truck to Convert it to a Winch to Lift Three Workers up a 280 Foot Tower on a Rope in Violation of Customary Practices and OSHA

It is not an inherent nature of a truck to convert it to a winch to lift three workers up a 280 foot tower on a rope in violation of customary practices and OSHA. While not directly addressed by the court of appeals, the first factor evaluating the "use" of the truck

³² *Lindsey*, 997 S.W.2d at 156-158.

requires the incident to arise out of the inherent nature of the truck.³³ “[T]he term “use” . . . does not include a use which is foreign to a vehicle’s inherent purpose but to which a vehicle might conceivably be put.”³⁴ “The proper inquiry . . . is whether the use . . . logically flows from and is consistent with the foreseeable uses of that vehicle.”³⁵ Further, the term “use” is “designed and construed to include all proper uses of the vehicle.”³⁶

In this case, the truck was not being operated on the highway, and was not transporting persons or property in the manner designed. Rather, the truck had been converted into a winch to lift three workers up a 280 foot tower in violation of customary practices and OSHA. Forster Barnes even testified he had never seen a rope system used to lift individuals up a tower; and he repeatedly questioned their decision.³⁷ Consequently, this accident did not arise out of the inherent nature of a properly used truck; and thus factor one is not satisfied.

b. Factor Two: The Incident did NOT Arise Within the Natural Territorial Limits of the Truck

The second factor evaluating “use” focuses on whether the incident arises from within the natural territorial limits of the truck, and its application demonstrates all of the factors are intertwined.³⁸ In *LaLeaux and Thornton*, the injuries occurred within the confines of the vehicle, while in *Lindsey, Merchants Fast Motor Lines*, and the drive by

³³ *Lindsey*, 997 S.W.2d at 157.

³⁴ *Lindsey*, 997 S.W.2d at 156, FN 12 (emphasis added).

³⁵ *Lindsey*, 997 S.W.2d at 161, FN 23.

³⁶ *Lyons v. State Farm Lloyds*, 41 S.W.3d 201, 205 (Tex.App.-Houston [14th Dist.] 2001, pet. denied).

³⁷ CR 723-724; CR 726; CR 1049.

³⁸ *Lindsey*, 997 S.W.2d at 157.

shootings, the gun was discharged from the inside of the vehicle and struck individuals outside of the vehicle.

In our case, the accident occurred on the opposite side of the building from the truck when the three workers were hoisted 80 feet up the tower. The only remote connection is the rope in a pulley system that was being used improperly and broke for an unknown cause. The accident clearly did not arise within the natural territorial limits of the truck.

3. Conclusion: The Auto Liability Exclusion g Does Not Apply.

The *Lindsey* factors, and the fact that it is undisputed that there is no evidence the truck caused or contributed to the rope breaking, demonstrates the court of appeals correctly concluded that Auto Exclusion g in the general liability policy did not preclude coverage.

WHEREFORE PREMISES CONSIDERED, Global Enercom Management, Inc. respectfully requests that the Honorable Supreme Court of Texas either deny Mid-Continent Casualty Company's request or affirm the lower courts ruling, and all other and further relief to which it is justly entitled.

Respectfully submitted,

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I certify by my signature above that a true and correct copy of the above and foregoing has been sent by certified mail, return receipt requested, to all attorneys of record as listed below on the 2nd day of October, 2009:

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