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Supreme Court of Texas.
In re Lumbermens Mutual Casualty Company, Relator.
No. 04-0245.

March 30, 2005.

Appearances:

Arthur W. Landry, Plauche' Maselli Landry & Parkerson, LLP, New Orleans, LA, for relator.
Sam Baxter, McKool Smith, P.C., Marshall, TX, for real party.

Before:

Wallace B. Jefferson, Priscilla R. Owen, Harriet O'Neill, David M. Medina, Paul w. Green, Nathan L. Hecht, Dale Wainwright, Scott A. Brister, Justices.

CONTENTS

ORAL ARGUMENT OF ARTHUR W. LANDRY ON BEHALF OF THE PETITIONER
ORAL ARGUMENT OF SAM BAXTER ON BEHALF OF THE RESPONDENT
REBUTTAL ARGUMENT OF ARTHUR W. LANDRY ON BEHALF OF PETITIONER

JUDGE The court is now ready to hear argument in 04-0245 In re Lumbermens Mutal Casualty Company.

JUDGE: [inaudible]

ORAL ARGUMENT OF ARTHUR W. LANDRY ON BEHALF OF THE PETITIONER

MR. LANDRY: May it please the Court, I thank you for brought me up 'till you do-- the idea before you today. The case that-- is presented here is fittingly argued at this school because it would-- the issue of this case would make for one incredible law school exam. I for one would not want to have set forth. I think that the history of the case is important to knowing the-- to understanding the issues and the reasons that we are hear today but having said that there are still only two discrete issues that we presented to the court. The first rides on a question of whether a liability insurer is virtually represented by its insurer. I would submit that in a non-direct stated it must be. The Kanel cash the case that we said to the court is not specifically address the question but I think that in situation were the Law of Texas would clearly indicate that would liability insurer must covered the judgment that is rendered against its insured as the case here.

JUDGE: Do you think it creeps under the current rule of-- and of the case representations?

MR. LANDRY: Yes your Honor, I do because the three-- as I understand the three prongs of that rule, first you have to show the

most important is that you be brought by the judgment and there is, there is many dispute that Lumbermens is fraud by the underline judgment.

JUDGE: Has the Lumbermens file the, the declaratory judgment action asserting non- coverage based on man corporation?

MR. LANDRY: No your Honor, it is not for a number of reasons, first of-- what is that stake here the two principles that are conflict at the right of the insured to protect itself against what is proceeds to be uninsured exposure and the right of the insurer to protect its only interests and the controls of the defense in the litigation. This two principles in this case did not come into a compliment until the case was all ready on appeal, in fact until the notice of appeal that deadline but notice of appeal has all ready passed. The appeal taken by Lumbermens insured preserves Lumbermens essential issue in this case-- the choice of law issue from which everything else closed. That notice of appeals covers that, so as a back date there was no basis for Lumbermens to ever cert that it is insured had failed to collaborate. When you said ...

JUDGE: What about the, what about the argument that he was filed timely?

MR. LANDRY: That our appeal was not file timely?

JUDGE: Or the motion to in advance.

MR. LANDRY: Your Honor, I will freely admit that having been presented what the question for which we have admitted to this court we can find no president. When the issue was squarely presented to us your response of issue was no longer before the court of appeal and the notice of appeal that run, we did not know what to do so the six weeks that we took to determined what are available options and to lend on what we thought was the correct one, which was the motion to intervene

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JUDGE: Would ...

MR. LANDRY: - I would point out that, that decision was so far have been wrong. What we concluded was our, our method of perceiving has been denied by the court of appeals twice.

JUDGE: Or so said there is no statute, no rule, no direct president that would required the court of appeals to to permit the intervention. So how can we-- how can the court say that the court of appeals have viewed its discretion on making up determination?

MR. LANDRY: The, the argument that we would make your Honor is to whether-- I, I understand that the-- and that's the argument made by the opponents, that if you can't cite to a rule, they can't be an I abused to this discretion in denying either the relief that you seek. The other is a breach of illegal duty to the other grounds in mandamus and the reason that we believe that one of the other must apply is that there is an any dispute that the Lumbermens has a right involved in this case. There are 29 million dollars at stake that the Lumbermens money.

JUDGE: That the skidis where to assert that file because if intervention were not allowed would you agree if the conflict none of the results set in the [inaudible]

MR. LANDRY: If interventions is not allowed your Honor then Lumbermens faces as, as I understand the question that, that the chief justice presented to me which is "do you then institute a separate action against your insured for declaration of no coverage" and I would respectfully submit is not a remedy because while that case is going forward the appeal at which Lumbermens property is at stake, the 29 million dollars subs-- its appeal upon that appeal goes for.

JUDGE: Because you have made and the appellate court to withdraw the ban?

MR. LANDRY: Your Honor, the court in my understanding, I can't appear from the appellant court at all, if I have no right to appear before the appellant court I don't know how I have the standing to file a motion to cancel the security and that is what, what would be required in this case if in fact the law concludes that what the insurer has done here as a breach of cooperation I will respectfully suggest as well-- I don't think it is. In the cases that we have cited to the court, what the insured did was reach the settlement with the Upers party and, and, and then one of the cases that insured retained an interest that the son of rights against its own insurer to the Upers party and then retain the financial interest in any recovery that has made. Now the insurer take a position that was collision, I don't believe the issue was have a result but here we have a situation were Huizar is taking as position, we can no longer assert this position on your behalf because it exposes as to a contingent uninsured judgment.

JUDGE: We would agree that this is a pretty sweep was to about intervention. What sort of parameters would you put on a rule that your acting as to creole. Only one of ban discuss it, only when the settlements they made about the insurer to protect the interest of the expenses that they accept. And what was the replay that you get on it to take this from opponent-- Alvin John-- for every insurer?

MR. LANDRY: Well, your Honor, in the first place I don't think that this is something that would occurred often. It had-- no ones to-- I just really ask for-- before.. Ordinarily this issues come up at the early stage in the proceedings, had, had refuse to-- had aren't sure to refuse to assert the choice of a law issue of a trial court. I believe in the a law of Texas we will have the right to intervene that point.

JUDGE: Well, I just want to say is that I can invasion many circumstances for the insurer that has [inaudible] letter decides to only limit the issues on appeal of the three form. The insurer can be come up before five other grounds but you have to incline of this possitive will leave that two appeals in the same time. Surely it was it that one that resolved. I'm sure what I'm said [inaudible] I did a jury that appetite in obviously have a half

MR. LANDRY: I could see how that could happen as well as your Honor and assert in the case that's-- that you don't anticipate, you cannot dispute every factual circumstances that may come up. I mean in this case is the Texas example of the ...

JUDGE: What parameters that you heard?

MR. LANDRY: I would submit that in the instance where the insurers money has-- it is presented as security for the judgment against the insured.

JUDGE: So when the band has been posted?

MR. LANDRY: On a band has been posted, the insurers property has been directly at stake in at the proceedings and if the change are the alteration in the lineup or in the, in the-- for the one that better word-- when the insured and the insurer for whatever reason brake rings after that as long as the dispute of conflict is in good faith and it seems to me that it is in the interest of the overall resolution litigation to allow the party whose interest are stake to intervene that point.

JUDGE: So if the band has not been imposed then you would say intervention should not be that.

MR. LANDRY: Well, if the band is not been posted then the insurer has not secured of the judgment against it insured and ...

JUDGE: Still want to be-- or the-- what will happen?

MR. LANDRY: In those circumstan-- in the event that the insurer would then institute an action against its insurer to recover what the judgment was, the-- if the insurer had failed to state the judgment, I think that's the point we have now your Honors, is that by posting the bond has suppose the Kanna catch the case were the insurer tended it's post limits. At posting the bonds, we preserve-- not only, not only our insurer rights to appeal it issues but the insurers right to appeals its issues.

JUDGE: You see this as a sort of intervention as a matter of right, or should be some good cause, burden theory?

MR. LANDRY: That is the way that we would invasion it your Honor. Again, on the standing that we recognized were presenting something that-- the grounds were intervention in the, in the district court we know more level and the intervention is supposed to we have sent a lot right, I mean, only subject to a motion to strike. And in the exceptional circumstances such as this we believe that then court decept a remedy allowing the intervention of right, again, subject to a motion to strike. We could not sustain a position that we had a right in this, in this proceedings that we have secured that right, then a motion to strike the intervention that the court of appeal would like to the same extent that they lay a petition for review.

JUDGE: What if they knows Sonet current settlement? What if they just decide that not to appeal this issue?

MR. LANDRY: And on-- as I appreciate that the law your Honor that date notify Usver, have we been advise that the better the issue would not have been appealed, we would have the right under the Dark reverse to representation to appeal and appear it on our way

JUDGE: So you wont get a limitation then. A kind of can that we can't there is a intervention right. I can por se a limitation being that the insurer has independent was secured, the benefit it self at the extent that the excess.

MR. LANDRY: Correct.

JUDGE: If there is a counts of parameter. But here is what will [inaudible]

MR. LANDRY: As, as we understand ago the only thing that makes-- what makes it case unique is, is the timing-- is when the writers wrote . If we are reading the law of virtual representation correctly at any stage prior to this and an appeal of right would have line or that could have been insured, it is only because the delays of the notice of that appeal have run at that we in that point could not file a notice of appeal.

JUDGE: You have the as soon on the duty to defend the right that is in this case?

MR. LANDRY: In surprise, Yes your Honor that is correct.

JUDGE: So why-- who you-- that the counsel modified your position that were in tied that point to instruct and put this on the brief.

MR. LANDRY: To struck counsel to take a contrary position.

JUDGE: Yeah.

MR. LANDRY: Your Honor I could not find a case that allows an alphabetic stands to an insurer the right to compel its insurer to take the position that is believe its address to its interest and the penalty of laws of its coverage.

JUDGE: That point there was a conflict of interest in the trial court you will have, in the appealing counsel and-- counsel insured, counsel insured-- What-- could you do that here?

MR. LANDRY: And that is, is-- I think what we seek here your Honor

but MR. Truman deny-- asking the court of appeals to let as represent the interest of the Lumbersmens because there is now in conflict of the interest presented, between the interest of the Lumbersmens and the interest of its insurer.

JUDGE: Since he has an extraordinary remedy is you indicate that you are seeking it simply required that your client at least attempt for the trial court to change the bond, to change the amount to have your insurer put up some bond. The trial court in Texas does have the ability to take evidence so the hearing to change the bond level in matters in the appeal.

MR. LANDRY: Again, your Honor ...

JUDGE: And you know they must be no adequate remedy of ...

MR. LANDRY: To, to my mind that the withdrawal of the security and the exposure of the insurer to uninsured judgment that at a time was so rendered was fully covered is, is extraordinary remedy or more extraordinary remedy than to allow a situation where the insurer presenting only one issue but the positive issue-- as far as the insurer is concerned and to allowed that insurer to come in assert only that issue while the insurer remains protected but again the judgment to the except that the judgment was covered on the false. Again, I come back to the fact that I don't see a situation like this as being one that I understand that presents a collision over that. I will point out to the court that interesting fact ...

JUDGE: The doesn't-- jury that ...

MR. LANDRY: I do not think that it is does, I think when an insurer acts to protect its own uninsured interest it is not acting, it is not guilty of collision, it is protecting himself. The attorneys that Lumbersmens highest the defendants insured have an obligation to act in the insurer interest even in [inaudible]

JUDGE: How's this different from Gandy? When Gandy we said it was collision and this-- the only different from Gandy is there [inaudible] after the [inaudible] brighter than before

MR. LANDRY: Yeah.

JUDGE: So we will wrong in the Gandy term.

MR. LANDRY: I don't necessarily agree that your Honor, I think there is a distinction on ...

JUDGE: I mean, I mean if the insurer and the third party get together-- you know would like the insurance company to pay for this one and if do that before judgment we call up collision ward is scared of calling up collision after judgment.

MR. LANDRY: Because I think that there is again a conflict between the idea of collision and the idea of the insured protecting itself against uninsured exposure.

JUDGE: So, so it's a not collision if you trying to save money, if you do it collision just only arise when your call [inaudible]

MR. LANDRY: Well, now your Honor it not prove foe reasons but in the circumstances where you have the counsel representing the insured that come to the conclusion that continue to maintain the position that has been in good faith taken all of it through exposes our client to an uninsured judgment-- we at that point have to make a decision. In this circumstances ...

JUDGE: What do you call the collision on that, is there any different from [inaudible]

MR. LANDRY: I believe is that your Honor, I believe in the ...

JUDGE: [inaudible] is trying to [inaudible]

MR. LANDRY: If the insurer want to agree at the settlement is what the El party is always trying to, is always trying to protect them

selves and has sound that reach some sort of independence settlement [inaudible]m sort of independence settlement and so that guaranty some certain amount of money part of the insured-- out of insurer proceeds and as in the other case as retain or right to recruit some of the money back, proceeds an insured then you, you would argue that was collision.

JUDGE: You said that it would be found by the judgment-- your saying you are not permitted to intervene here that you have no relief, no other legal [inaudible]n to avoid thing that put [inaudible]

MR. LANDRY: What I'm saying is your Honor we have no of the legal [inaudible]m to present to the court, to the court in Texas the one issue that disposes all of our procedures.

JUDGE: Why could you filed an applicants brief

MR. LANDRY: Your Honor my understanding is that the issue s that are been brief on the appeal at the issues before the court and

JUDGE: [inaudible] file all the time, sometimes even after argument

MR. LANDRY: But I wouldn't-- I do not believe that under the rules of the [inaudible] brief that we will be entitle to address in the issue that is not before the court of appeal, and I understand here is that the issue is not before the court of appeals.

JUDGE: So what are we-- to give you stand out if that is your position that dismissed the crimes with prejudice, is that?

MR. LANDRY: That's on the replay to us your Honor is that it simply to bad. I would point out if I-- let me finish that so I should not stop. There are bas cases were facts that live the [inaudible] results, in this case it such thing note that there is a proceedings still on the district court by which-- which Sonat has been declared also be our insured. So if there is collision in this event, there is collision by both of the insurance on the policy unfortunately we cannot substitute an action to address that and the declaration of recovered comes to late. The money post to the security for the judgment has all ready been lost. Thank you.

JUDGE: Thank you counsel, the court is ready to hear arguments from the Real Party [inaudible]

ORAL ARGUMENT OF SAM BAXTER ON BEHALF OF THE RESPONDENT

MR. BAXTER: Chief justice, may it please the Court. That was step on the outside and bring the briefs of, of the insurance company, who have devoted [inaudible] not a word to what this court has straggle with all the 100 years and that this [inaudible] mandamus a lot and the test that this court is all ready a [inaudible] both of the trial court and the court of appeals is -- has a nobody [inaudible]. Is that the abused of this discretion and that this question is review often only even the trial court or court of appeals could reach only one decision.

JUDGE: What is occurred in the trial court, what is conflict had occurred in the trail court, wouldn't they-- wouldn't the interest give in the [inaudible] coming in to the ban.

MR. BAXTER: I think they would have your Honor ...

JUDGE: What is that difference?

MR. BAXTER: Well, I think there are several reasons to try but it is different, but one year is a lot of single appellate rule this court is with and never allow anybody to intervene long after the trial court

jurisdiction has pass ...

JUDGE: If there are [inaudible]

MR. BAXTER: I'm sorry your Honor?

JUDGE: Is there are Federal [inaudible] on intervention?

MR. BAXTER: I'm sorry Justice [inaudible] i don't know Sir, there's not

JUDGE: How in a pledge in a [inaudible] did MS. Nedo after her child become [inaudible] with the nine circuits opinion intervene and move to dismissed and Kings [inaudible] Supreme Court when there is no [inaudible] group in the [inaudible]

MR. BAXTER: I think Judge Meg put some rules on that your Honor.

JUDGE: Well, how about the 29 million dollars, that's that's not amount in the [inaudible] rule?

MR. BAXTER: No your Honor, I think it's not ...

JUDGE: But you, you gave away to be the critical defense in the insurer has, right? Assurance of law?

MR. BAXTER: No your Honor, I did not. What happen is-- and I think it is interesting to know because the court has question about [inaudible] is that this was a [inaudible] says we've got deal for it ...

JUDGE: All right, and the deal and the insurer best [inaudible]

MR. BAXTER: I think not your Honor, I think ...

JUDGE: What, what, [inaudible] could they have better than the Louisiana law makes this close for enforcement.

MR. BAXTER: I think the primary driver-- is read your opinion and [inaudible] and said once you read that opinion that [inaudible] over. Once you read [inaudible] and find out the Louisiana law is not run on the [inaudible] case ...

JUDGE: Of course, that's what just the main league [inaudible] court of appeals.

MR. BAXTER: Well, it was [inaudible] and how reverse the 14-- burden of this court that this court certainly some other [inaudible] could tell that [inaudible] but if you look at the logic of the opinion and when that court and [inaudible] will [inaudible] that you got the let throught the statement of 187-188 in section six, there wasn't-- the whole lot [inaudible] we got the loser in our hand and the being sue that the amount in pocket, so why not take it bandage of of so now, where get them and to drop that law sue to get this which apparently how even according Mr. Lander-- we can't go back, this is law and we will [inaudible] and I going to take this fact that the top three issue that I have which have-- rather than the choice of law question each one of each will fall for divorce and the [inaudible] of the case because I don't want to go back and face the duty again because this time [inaudible]

JUDGE: Such a loser if I [inaudible]

MR. BAXTER: I made such a bad deal your Honor, I made a terrible deal and I have to do all over again, I would never do it, I would be [inaudible] court of appeals have scan it and well on my way here with that having decided my favor but in the turn I think both certain and both better than uncertain I can get back [inaudible] out of the case we can take in ...

JUDGE: Well, if it loser why wont you concede and going back to the or [inaudible] why are you fighting in the [inaudible]

MR. BAXTER: The false that policy your Honor that they wont this court to institute is so back but let me get to that here's what-- In any case is [inaudible] well known it goes up in the appeal parties have got to decide what issues are going to go court in [inaudible]

deals made everyday between the time of judgment and the time breach's over it to the appellant court about what issues there actually going to go up. Let me gave you some examples of what could happened at, at the level if in fact -your going to allow the intervention of [inaudible]. Plaintiff suits defendant for negligence and and worse negligence, plaintiff wins and they get a verdict on both negligence and worse negligence, it's a close case that if in the [inaudible] was the have the insurance [inaudible] negligence the plaintiff and he says look how make this deal with you. I want to fell the liability if you will gave up those negligence, I will only take up the damage question because I think I can be that, and two I' am going to protect my self and the parties agree and then the insurance caught me comes in the appellant level and says "were fine" you give in up[inaudible] and negligence a plaintiff now, but now let me give in to the case because I now want to appeal the liability portion of the case.

JUDGE: What would be the burden of problem with that if there's-- I mean just-- if there are no evidence in liability and you know there is a [inaudible] and the insurer understand and says "we can save you, you know, the whole [inaudible] there's a good reversal and rendition point that your missing here."

MR. BAXTER: Because what you are going to fall within your Honor is there is never going to be a case and with you can [inaudible] the appellant issue is by one side giving up an issue if the other side gives up another issue.

JUDGE: Well, that the dean troops can we have the white to control the defense, they have contractualize and once the insurer [inaudible] appeal has a-- how do they regain contractual right to control the appeal.

MR. BAXTER: They have exactly what justice Cabron and said it come [inaudible] they have a lawsuits against there insurer they can go say non cooperation you reach the contract.

JUDGE: One even though it encourage-- one we will encourage [inaudible] and litigation and possibly inconsistent result when the real-- first holder here has the opportunity to intervene the appellant court and get the issue result all it works. If we set your positions were are okay but the judgment action plus potential back [inaudible] litigation and potentially conflicting results. why we would take-- why should judicial [inaudible]

MR. BAXTER: Well, I think it is just a balancing of a of the policy. What do you want to do? Do you want to impact have parties being able to do narrow the issues and get those issues really matter before the court of appeals argue in fact you have what actually fall never happen is the lawsuits between the insurance company and its insurer but there was a lawsuit happen all the time, insurance company have that right now ...

JUDGE: How, how do we know your just narrowing the issues rather than deciding between the litigates would like the insurance company to pay for this one. I mean you can't narrow the issue that way that's what Gandy says, you can't narrow the issue before judgment by deciding the effect of the insurer say "how many confess judgment so my insurer can take point and you say they can't do that."

MR. BAXTER: That certainly what happen.

JUDGE: So, so why is that you can't do it after judgment but not you cannot narrow the issues before judgment but you can act.

MR. BAXTER: Narrowing the issue in the Gandy case your Honor is you pointed out in [inaudible] judgment, that's not what happen here Cudd is going up to appeal and asking the court of appeals to reverse

and render the case and when the appeals is obviously is the best three issues.

JUDGE: Well, if the insurance stipulate in the Trial Court Texas law applies when we said law there is not. Would the insurance company had a right entry in that point -

MR. BAXTER: Just right.

JUDGE: - wait a minute you stipulate me at the case-- I mean if you stipulate me that I' am a lawful, why in any difference [inaudible] the appellant court.

MR. BAXTER: Two reasons your Honor is that number one, now you have Sonet in the position were is giving up a value for all of the lawsuit [inaudible] but you can never get back. And number two there is a rule that this court right that says "you have the right to intervene in the trial court if you are part of the interest and you can apply for permission, you can be struck the trail court writes this question but there is no such rule for an intervention at the appellant level." This court has design ...

JUDGE: Is this no real advance prohibits it either.

MR. BAXTER: Well, your Honor I think It would be like saying there is no rule 60, if there is no rule 60 If there is no rule 60 I doubt to have an intervention of the trial court level. This court has said and it ruled that if you want to get in into a lawsuit you got to be a plaintiff and sue somebody, you got to be a defendant or you got to partition to court to intervene, intervene you right a rule for [inaudible]. The court has exactly the same power to write a rule of intervention at the appellant level for apparently this court has design that not to do thing.

JUDGE: But counsel even your description of the facts in this case, the issues that were considering today is suggest, this is the extraordinary situation or actually not considered extraordinary remedies?

MR. BAXTER: Because I think your Honor it's not extraordinary at all.

JUDGE: Even if the description is sound like very unique situation, there is a lot of state, and the situation of the party exchange after judgment, after the appeal have begun, sounds unique and extraordinary to me.

MR. BAXTER: Let me, let me, let me point two things, is that number one, I think that parties all of the time make agreement about what's going to go up on appeal, for example Cudd it self has a to decide of the 15 point [inaudible] motion for new trial and Magen take all 15 to the court of appeals or going to take my best three and I think that in you experience the [inaudible] tell you I'm going to take my best shoot on this issues and I'm not going to delete those issues by having ten or 12 more, that all this trial that takes up my brief [inaudible] and argument to the court of appeals in that situation Cudd could decide and in fact did decide that the choice of law-- I believe Justice Brister's opinion in [inaudible] is not a good issue for me. I want to take my best issue ups and by the way I want to get up Sonat and made decision. Number two I think this court recognized that if some juncture you got to get the issues before the court of appeals and its true is I understand that at least that the petitioner of the court of appeals as put it on on the first brief, there was [inaudible] encourage. Cudd uses this best three issues and let assume for a moment there is no deal in Sonat, and it says that top three issues, that the top three issues it put in brief in the court of appeals in [inaudible] and we replay.. Now the insurance company says but it is the ruling of

this court, wait a minute, you know, I like the whole bunch of issue so now after all of the briefing is true, I'm going to intervene, and I've got 12 more issues because the court says I' am not affected released of pretty good issues and were going to have is number one no chance to narrow the issue down between the party is going up to the court of appeal and now a expulsion of breach that the court of appeals about the insurance company that says "I didn't like those issues, I now seen all the briefs, I don't want that to come out so I now going to expand that brief and I' am now going to put this twelve other issues."

JUDGE: Do you agree that at least potentially depending on how the court determine the law that a conflict may resolved and the insurer not being responsible for this judgment, is that correct to the deck action or some other procedure.

MR. BAXTER: Yes your Honor.

JUDGE: What tactically happens here when a super[inaudible] how is that-- I mean do you-- the plaintiff execute and then the insurer tempered record that if there determination further is no covered I mean what-- how is this you know on the [inaudible] so.

MR. BAXTER: But I think waiver is the assuming we were to win at the court of appeals and when it this court to those issues that are before the court, and we were date to collect our judgment, we could in fact collect on the super [inaudible] and then the insurance company would have a action against this insurer for not cooperation or what ever those policy violation had it been and they could recovered their money from their insurer.

JUDGE: But towards did you all get to keep the 29 million.

MR. BAXTER: I hope so.

JUDGE: What ever happened.

JUDGE: But ...

MR. BAXTER: If we win, that's correct your Honor.

JUDGE: What ever under the scenario if the insurer is depending a case on a resolution of rights issue in case was also a judgment insurer against the insurer and there is an appeal that on appeal the insurer decides to settle that case within the limit that it has but exposed your client to-- perhaps an excess-- some amount in excess to the policy that are not covered, but you will have the right to intervene then an essence that also be reverse.

MR. BAXTER: And I think the answer is no your Honor I think Not. You could also have this situation let suppose for a moment that in this case or [inaudible] that the insurer has a insurance of to say and the judgment is for four million dollars and now there is an appeal in the same situation exist and the insurance company now says will you know amount four million dollars I don't like that. I like the fact the my insurer is giving up what I think to be good [inaudible] deal or upon their brief so now the Supreme Court ruling to intervene and they in fact intervene and they have the taste reverse and sent back for a new trial and if the new trial judgment is not [inaudible] but its than the insurer [inaudible]well, good try here's the fact may involved you by the way [inaudible] It some juncture the insurer has some [inaudible] to determined what that it takes the court of appeals and be it can protected their selves for lie judgment which either can play or shouldn't be required to pay by making decisions that may infect the insurance company, that they paid for that policy and if the insurance company didn't like it they could been intervene that the trial court level and got now parameter in the jury which they are not going to do to prevent that or they can say well, they paid their premiums and that's what happen, but it should not be get [inaudible] insurer that

they are allowed to intervene. And in this case it should not be the depreciate of summit that give that case based upon good faith negotiation were trial court is not believing.

JUDGE: I think it's a good analysis and I like that response but I'm resting [inaudible] and I think perhaps some others maybe used now there's not have-- it doesn't apply to this situation, I know they hit on a couples of time but I'm not [inaudible] that Gandy was not apply here.

MR. BAXTER: If I remember the Gandy fact, right your Honor, there was in fact a confession of judgment, there was a judgment giving up that the trial court level. Here nothing but [inaudible] and the insurer can make its own decision I did what issue you want to have the best chance of winning on the court of appeals.

JUDGE: I understand that but from this record that appears-- let me go-- that the agreement was reach and expensively and the insurer[inaudible] the judgment was in [inaudible] judgment.

MR. BAXTER: Your Honor it will only be the expenses of the insurances company if in fact they were-- that could is long about this appeal and two the insurance company would be write that the chestn the case of loan this court and some other court is going to turn that opinion, will try to think [inaudible]it was not and the insurer [inaudible] that's why ...

JUDGE: That you wouldn't say that the rule is on different choice to come up the other way. You just have a suit that you stop on that.

MR. BAXTER: How would I say that your Honor

JUDGE: We don't have any rule of what the [inaudible] about issue in the sense that the party could gave that in constant.

MR. BAXTER: So your Honor, I think what it, what is has to do with that is what the court think is a part of the residence rule is there were some collision and it would not be collision.

JUDGE: As I asked earlier wouldn't call-- is that amountv as party should may-- who stands us-- follow the top is not going to argue to made that what is made that was the bottom line in problem, that's the bottom line of problem.

MR. BAXTER: And that is true your Honor and, and of course they got two remedies. If they want to insurer directly the three, if they want to insurer that would happen they can write their insurance from that this is actually as insurance they could litigate crime fact they want it that said if I' am going to give you insurance-- now only can impose the litigation that I'm going to control the litigation that I want to control to brief-- that's not they can put that in every access insurance policy they want.

JUDGE: You say there is in the insurer may have assumed against the insurer you have to[inaudible] recovered, do you think in lawsuits that the insurer covered against it insurer will have to prove that what they won in this argument and the argument that they made, truly could this win because the argument is didn't sure what happened.

MR. BAXTER: I think the would be right your Honor, I'll give you some amount that this case will have to prove that the malpractice of the law, you would, you would interchange. I think ...

JUDGE: That raises they have a problem in the Gandy is in that case in Cudd has to argue that Texas law would have to withdraw which have never wanted to do and 'till the appeal and so that, that people would take the positions that they never want to protect that matter have to protect in order to rule.

MR. BAXTER: Your Honor I never thought that the record actually said that in the Texas law to apply both the trial court level when it

was a defendant as it was in the initial cases could in fact argue but such a law to applied it should be any shop to, to their insurer and the insurer is that their remand at time and I got Texas law applied the entire for the argue of that and in fact Texas law was applied. Let me say one more thing, I would disagreed, and the time is up your Honor,

JUDGE: Ehem.

MR. BAXTER: - but I would disagree that the insurance company is-- in the of the law court representation very fact they not done by the judgment under the-- in certain it can be and the third the test there was a [inaudible] come out the statute. Thank you, your Honor.

JUDGE: Thank you counsel.

REBUTTAL ARGUMENT OF ARTHUR W. LANDRY ON BEHALF OF PETITIONER

MR. LANDRY: Thank you, your Honor, I think, I think Justice Owen and Justice Brister could you finger right on the point which is the argument that the choice of law issue is a loser and therefore with simply just giving up this is be laid by what we have submitted which show that the court in Louisiana have reach exactly the same conclu-- exactly the opposite conclusion on the same case, involved in same contracts, involved in the insurer in the identical position of lawsuits that insurer let the State of Texas 'cause the state law went to Louisiana and got a declaratory judgment but it is not coverage and has no identity in the obligation.

JUDGE: Let me ask you -

MR. LANDRY: - has gone.

JUDGE: - how, how many times has drag this court grant a mandamus relief without finding that the lower court abused its discretion?

MR. LANDRY: I, I know to come back to that your Honor and I, I, I, I can send you to indications that it would have to be either in abused of discretion or, or a deny with, with-- a deny with the legal duty. Our arguments simply it goes back to the principles of the ready system suppose to work, we have a right, we should be entitle to the remedy.

JUDGE: Whether-- or what and so are you-- would be changing the mandamus standards in this case?

MR. LANDRY: No your Honor, we would[inaudible]

JUDGE: What's the abused of this discretion?

MR. LANDRY: Well, the abuse of this discretion question is in refusing to allow a-- un-name party to the appeal with the right to stake to appear in its own name to defend ...

JUDGE: Is always been and their always have their right in Texas.

MR. LANDRY: Parties whose I believe the parties which right has are stake and whose properties can't be taken, you have the right to refer in the court system and defend that property, protect their interest.

JUDGE: So you have the remedy, is not as good as limited as you would like to have and you might not mail on the band and then a sort of conflict of interest and get it back from insurer but there is remedy is just not there perfect remedy.

MR. LANDRY: Well, I agreed your Honor because I think it's store up further-- more problems than any of the scenario that we present.

JUDGE: So we will not talk about that remedy, it's not ...

MR. LANDRY: And not just here for the future that Mr. Buks is

suggest that the insurer can put its policy not only we will we, not only will we control the defense but what we cite is on the brief, that the insurer put its policy and we have the right to compel you to take the position on happen that will expose you to non-insured judgment. I've never seen a case in any fit deal of the fifty states that give the insurer a right to compel its insurer to do that on the penalty of laws of court. So that being the case would you will be encouraging is at Mr. Buks was point said in every scenario that they present they walked away of the 29 million dollars, that's, that's give even though they brought the layer [inaudible] also that sure, that they get 29 million dollars and then we have to find out with out insured and prove that the insurer acted in collision in seeking to protect its interest and try to collect the 29 million dollars[inaudible]

JUDGE: Did I-- leave up the correct sort of parameters?

MR. LANDRY: I can't belie-- well, your Honor, I simply do not believe that, that the law would want to encourage that sort of things to be done here.

JUDGE: Is part of taking up currently reversed the 29 million.

MR. LANDRY: Your Honor, I don't know, I really don't know and, and, and as you say I don't know that-- again, I don't know that we could have to prove collision. This is not as Mr. Buks was a point up. This wasn't a confession to judgment case Cudd defendant the case in, in a court with Lumbermens shared interest all the way through, what happened is that there is a contingent case now that makes excess explosion in this case, there is another case coming down the law and that's one of the other reasons that we are here. This is-- if this is ...

JUDGE: Before let me ask you, were winning changing the law in representation if we do not allow it on[inaudible] with 29 million dollars instate to get involved in the litigation.

MR. LANDRY: I believe you would be your Honor because I know that recognized that the case-- the Kanno cash the case did not come specifically decide whether an insurer is virtually represented by its insured I think it clearly it, it must be that's the only explanation that in a non-direct action statute states that I understand how an insurer interest can be protected. The other point-- basically what I'm hearing Sonat saying is we made a deal and it just to happens that the Lumbermens that this deal that we made profits you to the news and you just don't have any right to come and with me and try to plea-- had a-- is what being said there was no collision here there test [inaudible] that there was no collision here and I don't know where the insurer on a later collision trial that come up the evidence that there was a collision.

JUDGE: You can raise that simply not, simply not is coming out the line could you finished that.

MR. LANDRY: That's what I ask another point that I think is good. There are still pending in the district court what was called "the insurance covered lawsuits" this was the identity trial. Sonat at the second claim against Lumbermens direct us and in that case the district court is issued a summary ruling that Sonet is an additional insurer under their policy and that the Texas law applies. Now that law will translate in to a judgment because there is a basis for all this left to be try in the court so does damages. Then Lumbermens appeals that judgment it would like to a Sonet as error the court-- the district court choice of a law will in that case, two things were out if the Lumbermens succeed in that deal which case the 29 million dollars in this case would have been fall under no of law or Sonet come and takes

the position you buy the platos stopple court issues are been litigated at the end of the identity claim in which by the way you do not at the right or the chance to appeal.

JUDGE: Thank you counsel. Are there any further questions?

JUDGE: I thank you both, that concludes this argument and the court will now submit brief recess.

[inaudible]