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Supreme Court of Texas.
Guideone Elite Insurance Company f/k/a Preferred Abstainers Insurance Company,
Petitioner,
v.
Fielder Road Baptist Church, Respondent.
No. 04-0692.

October 20, 2005

Appearances:
Sandra Cockran Liser, (argued), Brown, Dean, Wiseman, Liser, Proctor & Hart, L.L.P., Fort Worth, TX, for petitioner.
Robert M. Roach, Jr., (argued), Cook & Roach, L.L.P., Houston, TX, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Justice Don R. Willett, Justice H arriet O'Neill, Justice David Medina, Justice Paul W. Green, Justice N athan L. Hecht, Justice Dale Wainwright, Justice Phil Johnson, Justice Scott A. Brister.

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JUSTICE: Be seated please. The court is ready to hear argument in 04- 0692. GuideOne Elite Insurance Company versus Fielder Road Baptist Church.
COURT MARSHALL: May it please the Court. Sandra Liser, representing for the petitioner. Ms. Liser have reserved six minutes for rebuttal.

ORAL ARGUMENT OF SANDRA COCKRAN LISER ON BEHALF OF THE PETITIONER

MR. LISER: May it please the Court. I'm Sandra Cockran Liser, represent the argument in insurance, the petitioner in this matter. Based upon a number of words that have been filed by the parties is clearly some far reaching notion on what this Court decide. But not that my job here. My job here is to represent my clients so I am going to try to focus on the actual case that is concluded in this Court. And the facts that raise and the evidence that to be-- and I believe, your Honor, just we look at the specific facts that you have to afford you. You will see that it is almost unconscionable that two parties to a contract-- an insurance contract-- can stipulate that there is

essentially no coverage and have the front court not be allowed to consider that stipulation. Now, I'd like you to know since it's very unusual situation again be force that had sophisticated insured. It was represented at all times executing the stipulation but essentially has establish and no coverage though we believe at to those facts that should be considered. If the court let's out the pleadings below specifically to join our briefings. The court was see that Jane Doe serve to church almost solely for about curious liability causes of action base upon the acts of Mr. Evans. Jane Doe specifically studied it that all of the acts occur to all Mr. Evans was a youth minister. There were very few causes of action that come out your they were in that would not have a reason why Mr. Evans was a youth minister or argue of the way perhaps before he was a youth minister because there are a few allegations about the church not providing ones.

JUSTICE: So let's say the plea agree to that, that assertion was groundless, false or fraudulent. Okay. It should not been in the pleading but it was. The policy says we have the right and duty to investigate any claim and to defend any sued drop against you seeking them and it's even if the allegations are groundless, false or fraudulent.

MR. LISER: I agree, your Honor. But we need to look at the entire policy language. The church is constantly use that three word phrase that's at the end of the paragraph that is being insure in an agreement. And in this particular policy there were two insuring agreements that you have to look at. One is under the sexual misconduct and one that is under the general liability. In both, in paragraph that deals with the duty to defend, the policy starts with language that says in the (c)(d)(f) portion to which this policy applies. And in the sexual misconduct the paragraph says which occurs during the policy period. The contract-- the policy-- continues to go on and state that we will defend even if it's groundless, false or fraudulent. You can't take that since it's our entire policy and the siege there are number of cases we've address that particular language in every single case in the Claren case. And the Claren case, the Cooth case, the Wade case they have all studied it. But the phrase groundless, false and fraudulent goes to the merits of the plaintiff's case not whether it's covered. In other words, I can't get a few minutes say Mr. Evans never did this, the church has no liability and therefore, I have no duty to defend. But I can't say there's no coverage. The church argues that groundless means even if it's not covered as to have to defend and yet the churches more direct to looking no case that has said that a non-covered siege is considered groundless and there's a duty to defend. So I would suggest respectively, your Honor, that the groundless phrase deals only with the merits and with the coverage. And because stipulation ...

JUSTICE: Have you separate those-- I mean if, if he was not employed as a youth minister and therefore, the sued against the church was groundless-- I mean why is that not covered by that provision?

MR. LISER: Actually, your Honor I believe that would be. One of the Amicus briefs that was probably with the very end-- that back my fold yesterday suggested an example where they said, "What is the Nucos never delivered. Detail in Nucos was never delivered to this Court or what if attendant know who's delivered before the policy went to that." Unfortunately, the right the court has addressing there it's in coverage. The first one goes to the merits, if the church says, "I don't know who Mr. Evans is," but unfortunately that's the merits and I would have duty to defend. When it's a coverage situation which are no

sounds of service but unfortunate that's the way the court has address coverage in merits. When it goes to coverage ...

JUSTICE: But it goes to merit. It goes to merit as well that-- didn't?

MR. LISER: Well, not in this particular case, your Honor. Because in this case, Fielder Road stipulated that he was a youth minister. He was a volunteer, he was a member of their church for time period covered by the plaintiff pleadings. There was never an allegation that the church didn't tag liability at least not into declaratory judgment action. The allegation was and the church imbedded in or stipulated to it that nothing that they could have done happen during the government policy period.

JUSTICE: Did you file special exception?

MR. LISER: Pardon me.

JUSTICE: Did you file special exception?

MR. LISER: Certainly, not to the underlying, your Honor.

JUSTICE: Would have it-- would it have it fixed to problem. You filed if, if they say it was OJ who did it and OJ was an employee of the church then the problem is under rule 11 and Civ. Prac. Remedies Code that totally groundless and the attorney keep saying should not to attorney pays for whatever money your ensure us. So the plaintiff tries to get a round that by saying a football player did it refuses to say who he is then you file special exception. You've flash your mouth and you make the attorney and the risk of their own sanction-- section ability says specifically, who were saying did it and when there were saying it occurred and then you can get off under the eight-corners rule. So what did you do it that?

MR. LISER: Well, because your Honor you raise a very excellent point. GuideOne is not a party to the underlying suit -

JUSTICE: Right.

MR. LISER: - and the attorney that we hired to defend Fielder Road until to declaratory judgment can't do anything that might harm their coverage. So if-- it obviously, if Ms. Doe have alleged that on December 2, December 24, February 3, Mr. Evans committed these acts we wouldn't be here. All she have to do he was allege when the acts occurred we would know whether they were in or outside of the policy and we wouldn't be here. And my attorney or their attorney that I hire can't do anything that's going to hurt them in an underlying suits. So I don't have that right. I have to do what we did here which is what insurance care's have been doing for years. We defended under reservation of rights we file the declaratory judgment, we attend this stipulation because Fielder Road did not want to subject themselves to re-deposition. The judge ruled on to declaratory judgment said, "No duty to defend a new victory of the defense." Now, one thing I would like to point out your Honor, we were provided with an exhibit this morning as soon the church will attend to and there argue it. For the first time based upon that exhibit it appears that Fielder Road is going to argue that plaintiff's allegations are not based upon Mr. Evans beg to employment that it has youth minister. If you look at all that could be use in the record that churches of the cases always been that they turn 1992 to 1994 or 1992 to 1993 and it's whether or not that's stipulation is equitable. So by the urge, your Honor that the exhibit is far as we trying to raise new argument shouldn't be allowed.

JUSTICE: Would your-- would-- do we have to overrule Heyden new announcement.

MR. LISER: No, I don't believe we do. I believe Heyden and Doctors still declares to allege was a review the petition deny by this Court

in 1998 upon that the purpose of the eight-corners rule is to not allegedly sure to go to the manner to the plaintiff's guess. I believe that it's true today and I don't believe that's what GuideOne is done but there were number of cases, unfortunately mostly that if could not stay district court cases and if the Northern district or the fifth circuit that say when your dealing with coverage whether there is coverage under a policy, you can go to extrinsic evidence. We should now allow a plaintiff to create coverage. If you look at Judge McBride opinion, it's an beeping from foreword I get to read his opinion for quite a bit. He is very elemental, but he makes very good points and the Western Heritage case. They first argued that the defendant was intoxicated and a course coverage was denied. So plaintiff got smart and said he was not intoxicated, he was impaired. And then of course they argue that there was a duty to defend and Judge McBride said that you cannot create coverage by changing the facts. And that's why he believed both of that case in the Blue ridge case that you have to look at the true facts to determine coverage which you can't go beyond-- behind the pleadings to say whether there's liability.

JUSTICE: We have this jury-- the coverage issue can't be determine you to fit in this case on the reservation of rights. The claim was merit less, that nonetheless you have duty to defend base on the first you've mention that you have-- the information you have torn up to the first couple of weeks of drawn. But then it drawn you find that the occurrence is outside the policy period. We shut down your defense there and look to ensure go on defending itself and what your doing that's an area?

MR. LISER: Well, honestly, your Honor, your asking me for a little speculation, but I would think in those facts that we should continue with the longer that we have now which is you cannot change your decision unable to defend these facts that develop through out the lawsuit. I believe one of the two Amicus briefs file that he to add merits your context claims talk about facts that are readily as obtainable ought to be the violence to determine coverage. And I think in most of the commentators on this issue, they discuss that it's apparent from phase that could be is a different coverage. The insurance can determine from the onset which no duty to defend. If it's not clear then the curious should do what god wanted. We follow declaratory judgment action have readily has obtainable facts that deal with coverage, have a determination that if god want losses they defend through the end.

JUSTICE: What about the policy argument that to that or undermine the insurance ability-- perhaps, undermined insurance ability to defend itself in the underlying litigation.

MR. LISER: One of the suggestion that anyone in the Amicus briefs I think is very well taken and then is the only evidence that you could use in declaratory judgment. Would be evidence best describable in the case for. I frankly do not believe that insured what actually testify one way in a coverage case and then testify another in the other case because one's underline he have the other hands both tongues. But if your something that can insurance carriers entitle to get from the insured that the plaintiff is not, then I think that perhaps that evidence ought to begin to because that could harm the insured because now suddenly there's evidence that's after that the insured-- that plaintiff would have never gotten the underlying case. So I think that's one limitation that perhaps should be considered to keep that harm from hurry. Your Honor, stipulations have been use in numerous cases, the Golden case and the Cooth case and in Western Heritage case

to go outside of the eight-corners rule. And I believe that it should-- it should be done here too and I further would suggest, your Honors that even with the exceptions that had been recognize by the Court of Appeals and I recognize that this Court has never actually written on in the exception to the eight-corners rule. This Court has to some extent given some guidance under old opinions, pertain one, I think it's very instructed to look at the Cooth case which was written in 67 and I believe by detectors can't afford. And then they analyze the two opinions issued by this Court in 1965, we never cause for obviously doing what we're doing. And the court said if you compare Heyden and Boll. Boll in his case represent our A and Heyden [inaudible]. It was clear that extrinsic evidence that would to the merits, the Heyden case is not admissible. In the Boll case, they allowed extrinsic evidence that want to coverage. To share that there was no coverage under the policy and the 65 court said in our range is not exactly agreed with it but still gives us guidance that with the facts, the extrinsic evidence go to coverage that should be allowed and I believe the court should do that here and the Court of Appeals having done other exceptions that this stipulation falls within. And the biggest that's never really been disputed is when the plaintiff's pleadings are insufficient to tell us whether or not there's a coverage. And in this case, the plaintiff allege approximately 1992-1994. Was that intentional? I don't know. I would assume Ms. Doe look at that accept courage could have be given specific dates to chose not too. But when she says approximately 1992-1994 and my policy goes into effecting March 31, 1993 I can't decide coverage. So in the exception has been recognize by the number of Court of Appeals which I think should be continued. If you can't tell from the pleading, your allowed to look at extrinsic evidence like this stipulation. And lastly, your Honors, I believe that the pleadings from the Jane Doe ...

JUSTICE: What it is-- what if it turns out to stipulation that church was mistaken?

MR. LISER: The one, your Honor. To some extent we had declaratory judgments. It deciding coverage for a long time and there's always the chance that there's going to be a wrong decision below. I frankly, I always staying because if I got two litigates who are fighting in the same thing and about a fact-finder whose looking at only one issue coverage, that's when your most likely to get the right decision. In this situation, I believe the stipulation falls within a readily as obtainable fact and so-- the date of employment. And so therefore, I think it should be accepted. I might continue just briefly, your Honor. I think I have problem here.

JUSTICE: Other-- I mean you can take some of your rebuttal time.

MR. LISER: If it that's rational, your Honor? Just briefly, I-- because I did not address by the insuring. I don't think it's fair to fill the road to not address that speak they widely respond. And I-- which is I like to point out, your Honors that GuidOne made it clear but badly into requires they which of harm to the body. The-- What Ms. Doe did below was exactly what Judge McGuirre against in western. She never allege bodily injury, he never allege that never allege to there this all mental until we follow a certain judgment. She amend her pleadings and all she states is that she's suffered bodily injury. That's a factual allegate-- excuse me, that's a legal allegation not a factual allegation. She has never wants allege that there is any harm allege to a body. She allege as she have never problem, she required counseling and those proper issues. Cowen made it clear that those do not trigger coverage on a policy that requires bodily injury. Thank

you, your Honor.

JUSTICE: Thank you. The Court is ready to hear argument from the respondent.

COURT MARSHALL: May it please the Court. Mr. Robert Roach to present argument from the respondent.

ORAL ARGUMENT OF ROBERT M. ROACH, JR. ON BEHALF OF THE RESPONDENT

MR. ROACH: May it please the Court. This is case is very substantially important to all policy holder in State of Texas. If you agreed that the propose that had have made of-- by this insuring to have either [inaudible] which is the insurance industry. They argued travelers in entire insurance history cares deeply about this issue for one reason. It was to save insurers massive amounts of duty to defend [inaudible]. If they can establish a-- grab that this Court will do something that is radical as it change it revolution in duty to defend all. And say there are no longer be a duty to defend unless the claims against the defendant are true. Groundless, false and fraudulent claims will no longer be defended in this case.

JUSTICE: Well, in this case the argue that remains claims on a merits and the Judge to read the policy in Todo and if all these things happen in the context of environmental laws. It determines that it occur-- the occurrence happen outside the policy period. There's no coverage whether you litigated before or after and the occurrence is outside the policy period and policy doesn't apply.

MR. ROACH: Is it covered approach that, your Honor. The first is that pre-exploded is there is only one type of coverage. Not-- As this the case, the sued two different types of coverage in policy. There's a duty to defend that in separate in the state ...

JUSTICE: And it's broader than the duty to indemnify. We know all that.

MR. ROACH: No, no-- has it-- but even more than that has a completely different basis through deciding whether that coverage is straight. And that is trigger purely on which-- by which by the allegations are false, true, groundless and fraudulent.

JUSTICE: Why is in trigger by the, the date of occurrence?

MR. ROACH: It-- The date of occurrence, your Honor is in-- is a covered issue but that's not the issue here. The issue here is whether no question that there was an occurrence in this case. They would challenge that, we can challenge that. The only question here is whether these claims against the church, whether they are a curious liability base on the employee or other claims that they directly to get to jury. And all that anything to do it whether in this Court-- whether the entire lawsuit no longer gets the duty to defend.

JUSTICE: But doesn't a matter when the occurrence happened-- I mean if there was 10 years ago-- 10 years before the policy was written so there would be no duty to defend.

MR. ROACH: Again, your Honor, that's not argue here in, in this case there wasn't question. In 1993-1994, the plaintiff allege that there's sexual misconduct and did instruction this, your Honor. In 1992, 1993 and 1994, that's what I'm argue that it wasn't any currency. There argument says, "I have stipulation and it says Mr. Evans was not an employee after December 1992." So our policy period, 1993 and 1994, he wasn't an employee and therefore there is no coverage. Now, that is

absolutely untrue, okay. That argument that he was not an employee goes to whether or not the church can be by curiously libel on responding at security worth theory in 93 and 94. That's all that goes to. It does not go to whether the church is on insure. There's never in the argument that the church by this policy is insure if there were sexual misconduct occurring during their policy period. These allegations are absolutely clear.

JUSTICE: But if they weren't they weren't sexual occurrences during the policy period then what?

MR. ROACH: Of course-- Now, this stipulation doesn't gather it.

JUSTICE: But if they're one? I mean you say there-- we're going to get pass the eight-corners rule but I have more troubles one thing is-- are there just no circumstances? No matter how clearly it is that there's no coverage then we're not going to look pass the eight-corners rule.

MR. ROACH: That is teh big issue. Absolutely, and that's where Heyden comes in. It were-- or do not conceal and, and-- yes, your Honor. And I know that it is skeptic to say to complete the duty to indemnify issue whether it-- there-- the allegations are true, whether not the occurrence actually did occurred in 1994 with the duty to defend. But that is absolutely contrary to both the insurance contracts and to this Court holdings for 55 years-- well, for 40 years.

JUSTICE: But if the-- we have this case, but if the stipulation were that he was not employed during the policy period, he was gone and stranger to the church.

MR. ROACH: Yes.

JUSTICE: But nevertheless, there were pleadings that, that was not the case you say a duty to defend.

MR. ROACH: If the petition alleges that they did occurred. They're not through the time and yes, the duty to defend. That's always been a law. Now, your question goes why, why shouldn't we change the law? I, I assume because there are commentators who've said that. The insurance industry would save a lot of money if that were the case. Here the reason why we shouldn't do that. A part from this particular contract alignments and the facts that you would be doing something this Court have never done before which is to ignore and express through the through the party. I can take up no other connotation which this Court has ever said. We say it's appropriate to rewrite the policy. Take this agreement out and ignore. I've done that before. Over turning start the sizes engaging in traditional act-- traditional activism not some of this Court has ever, ever raise before.

JUSTICE: Traditional activism?

MR. ROACH: Absolutely.

JUSTICE: This is an area the common law. Isn't it?

MR. ROACH: It is.

JUSTICE: There's no statute. Your the governing constitutional provision?

MR. ROACH: Right. But there was a contract. Absolutely, there's a contract between two parties and it says, "All the allegation groundless, false or fraudulent will be defended." Your right to this out of the contract if you adapt this view that if the allegations are absolute, groundless, false or fraudulent the country, we won't that view. That's traditional activism.

JUSTICE: What's the what's the history-- what's the history about language? or where did it come from? Why is it in policy?

MR. ROACH: Your Honor, I know that it was in policy for long time. I can't say how far that duty in this briefing goes.

JUSTICE: Why is it there?

MR. ROACH: It is there-- Yes, it is there because when you are-- when you are the defendant and you've paid for duty to defend the coverage. The plaintiff gets the billford against you on those allegations. When the insurance company provides you with defense or not then your been in half to defend. So the whole concept was if your going to paid premium dollars to get the defense you want to get what you've paid for. So we-- and the truth is many or most lawsuits against the defendants are probably not true then you deserve a defense even more so where you did not commit the wrong. When you are nor a court fixer. When you do not all damages, you should have a defense paid for by the insurance company, you paid all those premium dollars to for defense coverage as well as for indemnity. This Court has acknowledge that there are-- the, the defense obligation is the more expensive and it's the most-- more expensive, your Honor, just to seek you for the debt for. And it's the most important to defendants because your always going to be having to defend yourself. You may not have to paid a money, you may not be, be a judgmental at the the end of the trial. But you are always have to be a defendant defending yourself.

JUSTICE: But there's collusion. Is your collusion the same? Collusion in order to obtain claims in the coverage between the parties and the underlying dispute.

MR. ROACH: I, I'm not here to state collusion. I'm not here to say it happens all the time where it never happens either of those. But yes, your Honor that's our position. In those rear instances with it does happened. The overwriting importance to policy holders to get what they paid for, a defense of laws.

JUSTICE: Isn't-- Is it a crime to knowingly allege all statements in the civil action?

MR. ROACH: All right. It's a crime, but absolutely look the contract or rules, your Honor. Your sue to follow the truth.

JUSTICE: Is it a crime to make to make false statements in an open court? and open court to the judge and put those in writing?

MR. ROACH: I know that sanctions. I do not know this Court ...

JUSTICE: If it is criminal whose judicial position change?

MR. ROACH: Absolutely not, absolutely not. It's not a plea issue.

JUSTICE: So the contract should-- So contract should, if there's a collusive crime being committed, the contract should even trap the-- trap the criminal law.

MR. ROACH: I guess I don't who stand the collusion as that the plaintiff's lines for pleadings. There are false and fraudulent.

JUSTICE: Well, the collusion-- collusive aspect could come in and I know it's not this case. I'm trying to understand how far your rules is going to take us. How far your arguments going to take us because as you recognize we're not just deciding this case and that the justice here but we've going to think about these implications. If there's a collusion between the parties and the underlying collusive and the bad sets of circumstances where they agree that we're going to-- plaintiff says, "We're going to file some alle-- writes some allegations that are going to get defense for you," and, and, and insurer says, "Well, I'm going to do everything I can even if it's false to making false representation to get coverage so that we can both get out of this with the with the benefit." Innocent doing that in open court making false allegations knowingly as a crime, then the insured still entitled to it under those circumstances.

MR. ROACH: Yes, because there two different issues. Prosecute the crime, but do not make a rules that based on trial in exception there's

a criminal. It's just improper and then we do not suppose or presume error. And it did occur prosecutors, prosecutors false been in law but let's not create rules around to something that crisis this Court never see.

JUSTICE: So we give you another exemption. Defendant doesn't have the car insurance for 2000 but does have a policy for 2001. There's a wreck in 2002, the plaintiff finds this out so the plaintiff would simply allege. This isn't a direct to place in 2001. -

MR. ROACH: Sure.

JUSTICE: - Who and so-- now, we all know that's not true. We all know their uninsured but the plaintiff certainly not going to insured it because they want-- to at least some settlement value because you've going to pay this against attorney to defend the whole case. The defendants not or allege it so nobody is going to say anything about it and even though we all know this was no coverage we're going to act like there was and all the policy holders for a defendant insurance company or no subs as the sue.

MR. ROACH: Well, for the defense dollars, yes. For the indemnity, obviously no. There would be no payment-- direct in church have sell that [inaudible]. Sure, but yes through defense and that's because the insurance industry who are time in memorial has known that that occurs. And this is not a revelations if it's not into secret to them. They budget that.

JUSTICE: And were do not back since 1965?

MR. ROACH: Absolutely, your Honor. Way back 1945.

JUSTICE: But not you person in the court.

MR. ROACH: But those kind of-- I mean yes, there are certain situations that really pain us to say, "Why should we-- why should we assume, why should we-- the assumption that covered only now were not true and the truth is because you have to separate out these two different types of coverage."

JUSTICE: Is there any other way to make that happens to present opinion was a covered to dispute? That's clear and I realize some of the more clear but if you do have a clear at own coverage. Can you get findings about the conclusion of law as an evidentiary matter and that proceeding?

MR. ROACH: Does it take action?

JUSTICE: Yes. And with those, how would that affect the defense at the underlying scene?

MR. ROACH: I guess I'm not sure what exactly happens to direct action. In your scenario, that is there finding of ...

JUSTICE: When the car record occur?

JUSTICE: Yeah, I mean you, you, you have a trial and-- a quick trial and trial court finds-- I find as an evidentiary matter that the direct happened on next date and does that then find -

JUSTICE: - the plaintiff problem, they know it.

MR. ROACH: Of course not. I could if-- because the plaintiff wasn't a party. And that's the secret fights here that your, your Honor said, "No. When we talk about the hypothetical and we're suppose to assume the truth." But that's-- and that's way for her. But that's not the way that real world works because we don't know what the truth is. All we know is that the plaintiff has allege XYZ cure. The plaintiff alleges where the sexual misconduct every year, 1992, 1993, 1994. Well, alleges little more that. She alleges his an employee in 1992-1994. Two separate deals, two separate sexual misconduct by Evans in 1992, 1993, 1994. Separate in the part from the employee status, your Honor that those sexual misconducts occur, okay. The church is being sued for

direct responsibility for failing to warn, for not stopping the sexual conducts, for breaching through the jury duty except knowing that the allegations that plaintiff are the church knew that that conduct was going on at all times. Did not stop it, did not warn it and that theory directly against the church makes them liable if fraud is completely independent of whether or not he was no longer an employee in 1993 and 1994. Even on about curious liability issue, your Honor, they plead apparent agency. He can stop the stipulation even if it were accepted. It could accepted as true so that Mr. Evans is no longer an employee in 1993 and 1994, that's still lives the allegations that we have to assume as true under common law and at the contract that he was an employee in 1992 to that period of time. The allegation say he develop this relationship of with the young girl and to that allowed him to commit these terrible things. It alleges that she believes, he-- that they all believe that he was in a plea during all that time. You have just made out in apparent agency theory, that even though he wasn't an employee, she taught he was still an employee. In 1993, 1994, their policy period when the sexual alle-- sexual misconduct occurred. So even the employees, not employees stipulation does not get them out of having two defendant this case. I don't have to tell this Court that all I have to do is that one allegation that potentially covered and they have a duty to defend. I just given you about curious liability theory, it's not responding at security work and I've given you all the direct theories of liability. So for this case, it's really simple. They have to defend this one under those allegations.

JUSTICE: It's not clear to me on the more academic point of the eight-corners rule and possible section to that. What consensus there is in the American jurisdictions? Should we rely on that?

MR. ROACH: Well, I would say I would say that the-- there church American States are all over the world on this issue. True. Your Honors, some states that only provide extrinsic evidence to prove at a duty to defend. There are some states that allow with both proving duty to defend and not proving duty to defend. I-- We can say, we are the majority but we are one outnumber states who are have been viewed as being strict eight-corners rule jurisdiction. I favor the Northfield approach, your Honor. I truly believe that for lots of practical reason, the strict eight-corners rule is the best rule. But, but clearly exceptions are permitted in other jurisdictions and a permission-- exception could be permitted here and the Northfield approach makes not a lot of sense. Very, very narrow, do only to the issue of coverage.

JUSTICE: What exception would you make? you admitted to go you wouldn't make an exception for the permission of the crime. So what other exceptions are there?

MR. ROACH: Your Honor, I don't think I don't think anything related to the merits-- Oh, I'm sorry-- because of that permission to crime of fraudulence in my example that I have purposes.

JUSTICE: Right. What we know-- why would you-- So if the crime, does it create sufficient basis for an exception. For you, what does you just-- I think just not said there could be some exceptions. What, what would they be that are appropriate in your might haven't tried?

MR. ROACH: Basically, adopting the Fifth Circuit case in order 2. I'm saying, number one, if there are insufficient facts in the pleadings to tell whether you are inside or outside the coverage. Not this case and certainly, not this case would affect the groundless, false or fraudulent, okay.

JUSTICE: I didn't say criminal and at least groundless, false or

fraudulent.

MR. ROACH: Did-- your Honors, it, it made a criminal exception-- you know they live of-- no sign at all.

JUSTICE: I'm, I'm asking-- I'm trying to figure out the contours of yours position that are does it reach you, you got my attention just a minute ago when you said there maybe exceptions. I don't speak up what they are in your mind.

MR. ROACH: Okay. Here's, here's my here's my brief. Number one, approximately in tempt the inscription. Number two, this basic evidence should only go to a period covered issue. If the evidence-- extrinsic evidence goes to the both evidence coverage in merit's issue. I'm telling you and because of the potential prejudice that compromise but it didn't does the periods defense below. I believe that there should automatic abatement of the-- of that action if there is a claim that it just don't remits of the claim case. Here's the ensure assessment, look, there's extrinsic evidence, a discovery on the extrinsic evidence put me at risk in the underlying case because I have to be imprudent something that's back from me at the libel of the case, it overtook that defense [inaudible], hat should be. Next, there ought to be a defense in the coverage case pay for by the churches. And into the counsel should be provide so that the insured does not have to pay for the defense of that action, the extrinsic evidence to take action. It only paid there, there premium dollar for the defense if this Court says, "We have to serve about the case is going or going forward that should be go forth then you commentate the premium dollars we should get, we should get at least-- they not had him paid for an hour just from their own pocket."

JUSTICE: It's any other-- Is there any states to requires that?

MR. ROACH: I believe there is a-- I can't promise with this I believe now [inaudible] ...

JUSTICE: I couldn't at least come to money?

MR. ROACH: Yes, California. So-- Again, your Honor, I would apply the rule-- I would not permit in any extrinsic evidence exception if the allegation is groundless, false or fraudulent. If that species of, of coverage problem that the attorney's can't be raise. It will only be whether is, whether is nothing said. And let him to say that this will work for policy holders just as well is it worth for insurers. There are many cases, your Honor where maybe was a crime that the plaintiff did not quite into their pleading. The exposure case there would be necessary for the policy holder to trigger a defensive particular year. this circuit case called ESRA that said, "Because the plaintiff's allegations is completely silent as to Wendell." Petition had not been inferred. But petition is insufficient to put the insurance company for this particular year on a look if we adopt an exception rule the policy award now be able to go forward and prevent-- generate extrinsic evidence that the pollution event that occurred in a particular year. Policy holders would love that, that's why is long as there was an even ended approach conceptions, that's fine. The truth is that the only party that looses is the policy if they have to come out of their own pocket to pay for their prosecution or defense of this declaratory judgment extrinsic evidence makes.

JUSTICE: There any further questions? Thank you.

MR. ROACH: Thank you.

JUSTICE: There's not be any other does-- that given your initial presentation that plaintiff never allege bodily injury. Is that right?

REBUTTAL ARGUMENT OF SANDRA COCKRAN LISER ON BEHALF OF PETITIONER

MR. LISER: That's correct, your Honor, until the 30 minute petition and then in her factual allegation sh-- all she stated was Jane Doe suffered bodily injury.

JUSTICE: Relies to that's petition certainly the parties are entitled to plea and re-plea then sometimes plea themselves into coverage.

MR. LISER: That's right, I agree. Say that's one of the things that they did. But the Seattle Engineering case talks about that when your looking at coverage you will get factual allegation as not illegal conclusive. Bodily injuries are legal terms when you look at the ...

JUSTICE: Is not makes-- It's, it's, it's legal issue? ... Whether there's ...

MR. LISER: It's probably next but if you look at our actions about factual allegations-- I'm sorry, your Honor.

JUSTICE: No, go ahead.

MR. LISER: She didn't goes on in her damages. And she talks about exactly what she suffered and she talks about mental anguish, need counseling, depression and it never once. Is there any allegation that she had any words entered.

JUSTICE: But is not assertion of sexual assault or abuse or exploitation or ...

MR. LISER: There was no assertion of sexual assault or abuse. In, in this case, your Honor, I believe Ms. Doe is a teenager and obviously the way that the policy is written. It requires bodily injury excluding sickness or disease because I believe it's the intended god want to not cover for conceptual sex there has to be an actual bodily injury. And Cowen has determine that bodily injury are harsh more damage not just because you're upset about. I would say that Ms. Doe's just wants state [inaudible] on a bodily injury without worries and not enough to make Cowen. And your Honor, one of the facts that Fielder Road brought up exactly we've isn't for. If the eight-corners rule work to both ways it's not just that insurance industry that wants this. It's the insures too. All of you have been trial orders I can tell you that I had many cases or it goes both ways. The insurance company denies it defendants because the pleadings don't have backs to trigger coverage even though everyone knows that there's really coverage. So what's important for both insured and insurers that this situation be clarified and I believe it's important and I believe several you mention is I agree that when you paid for policy you are entitled to a defense whether you did something wrong or not.

JUSTICE: So your saying if the-- that the petition does not allege and you expect the-- for which your third coverage then what the plaintiff can file deck action and say, "You have the extrinsic evidences at this petition is really talking about the incidents that occurred into the policy."

MR. LISER: I believe that should go both ways. I don't see why it should be in the other. And I agree that you-- their entitled to a defense if it's in the policy just the suddenly you've stated what happens at the accident that happened 10 years before the policy. What if everybody we know the accident happened in 2000 but the policy was in 2001. A coverage voter is entitled to a defense but only if there's coverage. And Fielder Road has still not cited one case that tells you that groundless, false and fraudulent applies to cases for which there

are no coverage. Professor Dochamly and her trigger is not believe [inaudible] the early 80's discuss that that language change in most insurance policies. One taking was decided and they started adding in different language. Now, Professor Dochamly stated that in the 80's that she believe the language still meet at the degree to defend was farther than the duty to indemnify. Judge McBrod and the McLaurence case at the Northern district stranded that would the present data language in policies and the language he interpreted was very, very similar to the GuideOne policy. He felt like the duty to defend was no broader than the duty to indemnify. If you look at the policy, everything that Fielder Road keeps telling you is to take three words out of the end of the paragraph. And if you look at my brief-- again at the bottom of page 15 and through 16-- I set forward both provisions in their entire to and both provisions require that it occurred in the within the policy period are that the policy covers it and there's nothing has been presented to you that by the shear fact it says groundless, false and fraudulent. At somehow have to defend something that's not covered and again, your Honor, we never stipulation it's a contract between GuideOne and Fielder Road Baptist Church Baptist. They stipularly that there was no coverage essentially a stipulation that Mr. Evans seems to be youth minister, seeks to have any role with the church before the GuideOne [inaudible] to effect. And for the first time-- excuse me, your Honor-- Thank you.

JUSTICE: Thank you, counsel. And that conclude this argument and our argument for this, this morning and Marshall will now adjourn the court.

COURT MARSHALL: All rise. Oyez, oyez, oyez. The Honorable Supreme Court of Texas will now stand adjourn.

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