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Supreme Court of Texas.  
National Union Fire Insurance Company of Pittsburgh, PA, Appellant,  
v.  
Beatrice Crocker, Appellee.  
No. 06-0868.

January 25, 2007

Appearances:

Thomas C. Wright, for appellant.  
William C. Schmidt, Austin, TX, for appellee.

Before:

Scott A. Brister, Phil Johnson, Dale Wainwright, Nathan L. Hecht,  
Paul W. Green, David M. Medina, Harriet O'Neill, Don R. Willett,  
Wallace B. Jefferson, Supreme Court Justices.

CONTENTS

ORAL ARGUMENT OF THOMAS C. WRIGHT ON BEHALF OF THE PETITIONER  
ORAL ARGUMENT OF WILLIAM C. SCHMIDT ON BEHALF OF THE RESPONDENT  
REBUTTAL ARGUMENT OF THOMAS C. WRIGHT ON BEHALF OF PETITIONER

CLERK: May it please the Court Mr. Thomas Wright will present argument for the appellant [inaudible].

ORAL ARGUMENT OF THOMAS C. WRIGHT ON BEHALF OF THE PETITIONER

MR. WRIGHT: Chief Justice Jefferson, may it please the Court. This is one of those happy occasions where this Court can accomplish justice adhere to precedent exercise judicial restraint and avoid its proliferation of law suits that's all in one case.

JUSTICE #1: What about the due justice part? Can you say on that.

JUSTICE #2: Can we do that too?

MR. WRIGHT: That's the first one, that's the first one I want to talk about that you can do justice in this case by answering the question the district could ask "No." Justice said just to set the stage of course, the Fifth Circuit has asked this Court whether it wants to imply a duty in all insurance contracts where the Insurance Company to find and advice sufficient insurers or perhaps omnibus insured of a potential right of coverage.

JUSTICE #1: [inaudible] assume you find the insurer, what-- is it furnishing to advice in?

MR. WRIGHT: Well, it maybe a burden some as the insurer won't answer letters.

JUSTICE #1: Not seeing the files, you're sitting in room with purely counsel burden in her required-- is it-- what's a burden

advising them that they are covered in [inaudible]?

MR. WRIGHT: Well, first of all if you're counsel for the employer, you're not the agent of the Insurance Company. But if you want to step down and give somebody he was not your client ...

JUSTICE #1: Okay. You're the insurance, you're the claim insurance, you represent the Insurance, you're the Insurance company's employee is given the assignment of addressing his claim and in room was a driver and driver's employer, no question that the insurance covers both what's the burden of the insurer of saying, "We insure you as well to someone whose unsophisticated nothing harm policies that the employer may or may not procure."

MR. WRIGHT: Well, it's not burden of some issue in the same room. Of course, if you're in the same room, that means the additional insured had come to some effort to meet with you and will meet with you, which is not what we have in this case. This will be a four case to adopt the rule about what somebody have to say to somebody who won't accept any communication.

JUSTICE #1: At this point I'm just talking about the case where the insurer is or-- and they insured all together in the same room but been no problem finding what would be-- what would be the policy reason not to require the insurer to advice specially in this instant case orbit, insured not sophisticated, they don't know anything about their problem.

MR. WRIGHT: Well, under those facts, your Honor, there's no particular burden of policy reason not to say-- well, of course, in a conversation, the Insurance Company are conventional but the distinction is you cannot imply further that if the felon is living with you. He is asking for your help and want some you know, Insurance Company involvement in this case that's not what we have here.

JUSTICE #3: But what's the policy reason? You said policy reason, what's a policy reason not to do so?

MR. WRIGHT: Well,-- first of all, before this Court starts changing contracts on the basis of public policy I think the court ...

JUSTICE #3: You mention po-- policy I'm just responding to your comment.

MR. WRIGHT: But I was trying to respond on the other hand. Anyway, [inaudible] by justice. Let me start over again a little bit by saying this case should not require us the need to take us with Paul Pierceman because it plead everybody objects to all the pleadings that over at last time. Mr. Morris were the person responsible from not acquiring and answer not doing anything about this summons that he got and early told him what he did. So you got a default judgment against the good news, bad news from his prospective is he doesn't have any money to pay that judgement anyway. So it's not a big factor. Mrs. Crocker will hinder but the jury founds she would anger as a result of any negligence of this nursing home or of its employers. So under the law, she should not be the recover. And National Union should not have to pay the default judgment entered against the insurer who never ask recovers, he never sent the papers, he never have made any contact and indeed were not responding the contacts of the directive.

JUSTICE #3: Well, typically my guess is that most of the time that company get suit because of inactive employee. Company notify the security of the content maybe ensures [inaudible]. Are you saying there is no duty to do that?

MR. WRIGHT: Not only if the employee won't send the papers and wont communicate, the Insurance Company has no authority to answer for him. This is an attorney-client relationship that it is ...

JUSTICE #1: But it, but it usually happens. What's you say?

MR. WRIGHT: I don't know that it usually happens. I think what usually happens is the employer probably gets a little more proactive in trying to bring the employee in. Here of course, the employee had been fired, but if you ask-- you know, ask between the Insurance Company who doesn't know who's the employees are to sort that with-- or the employer do all to tell this employees that they got coverage. I think that it ought to be the employer because if he create a rule that starts-- you know, requiring an Insurance Company to investigate to find out who all the potential omnibus insured and the potential additional insured that named or usually are not named but might be named on the policy and advice him of potential coverage. There's no end to the litigation this going to be expand by because many have to decide of what knowledge on the Insurance Company part is enough to trigger out. Somebody reads about the statements paper and so knows this person probably in additionally insurer or if somebody in Human Relations Department additional claim has a friend who knows and then what kind of communication is going to be told him if-- this has to be in writing? Is it have to be in English? Supposed they can't read, they're going to be a numerical questions that come up about this duty and that's why we says it best and nothing to change, without to change the rule in weaver, the rule in waiver. Rule in waiver was reaffirmed by this Court in a hard office. If a ...

JUSTICE #3: How this English play to your argument? You're now talking in submitted by the Insurance Company in United States that are in any other language but English, but how is that play in your argument?

MR. WRIGHT: Well, if you have observe -

JUSTICE #3: Quite it served.

MR. WRIGHT: - if you have to look at this circuit's question, you have to take reasonable steps to advice an insurer. In this case, the insurer, Mr. Morris says, "He couldn't read very well," he could read for about two minutes and then he clipped a piece of paper and it would give him a headache because [inaudible].

JUSTICE #3: Not too many people, not too many white people acquit in church policies waiver statement that's it is.

MR. WRIGHT: All right. Well, then if that's true if you adopt this duty and the Insurance Company sends the policy to the insurer then somebody's can [inaudible] that was an enough you need to expand the term. That's what I'm saying this if you go down the road operating as NOC duty that afford nobody says anything with be Insurance Company they have what? Find those person and make them understand that they got a right defense. They're be no answer the variation.

JUSTICE #2: Well, once there-- once there's an senarkhnetic client, all that she has just to do ignore question about it. Well, what once-- if the guy forwarded the papers you would have had the duty, you know to hire an attorney for it attorney then look we need answering, we need to show deposition, we need to do all the set step. So there's no question if did sent the papers to you-- you'd have all of duties -

MR. WRIGHT: Well, if they -

JUSTICE #2: - they do it no matter how stupid it was.

MR. WRIGHT: If-- well, the attorney is going to have that duty. If the papers had been sent to the carrier, the carrier would have hired an attorney made an the same attorney in this case and the-- the attorney would've answer for the person under [inaudible]. Of course, If Mr. Morris had answer himself -

JUSTICE #2: We got twist that back but not EPI's deposition supposed the insurance gesture, representative and its attorney for the insurance, for the employer is it nard and watches this person, their additional insured to be handed papers. No was deserved watches what happened. They have duty then to speak up and say, "You know, your recovered."

MR. SCHMIDT: Well, I would say-- you know, if this is a deposition and you know they plaintiff has notice of deposition of employer who's-- I don't know that the insurance gesture is going to be there. The problem that you have here is that the deposition is usually not attended by an insurance of justice.

JUSTICE #2: But the problem we have here-- or it's a policy to cover somebody they don't know it.

MR. SCHMIDT: Well, the other problem we have is the person doesn't care. His got no money to pay his judgment anymore.

JUSTICE #2: Two, two different questions, not everybody made this bad as this guy and I'm-- you know, the question for is: Do we rather rule the bad guys, do we have rather rule for everybody? 'Cause bad guys is a very factual intensive group.

MR. SCHMIDT: Well, ...

JUSTICE #2: So what-- but the question really certified to us is: Why he do-- what your duties with respect to policy where its very unlikely to policy holder, knows their policy holder?

MR. WRIGHT: All right. Well, ...

JUSTICE #2: And its got to be some duty there to do something because otherwise they will never be any coverage there, right?

MR. WRIGHT: No, there-- in a normal case, now-- which you're talking about is creating an abnormal rule for an abnormal situation that would not had change the result here. Supposed that letter that was sent had said, "You might be careful. He doesn't receive the letter. He's not-- accepting certified mail, he doesn't read my mails if he gets it." So it's not going to make any difference. In this case this is a four case to private imposed and create as a matter of public policy some extra contractual duty, and this by the way, we'll have to be a compact duty to do Mrs. Crocker [inaudible] witness said in the head case. We're not implying anymore a contact duties, the stouter's duty and the duties under the contract or not to protect the insurer -

JUSTICE #2: If ...

MR. WRIGHT: - and I will go on to save the duties under the insurance code and the DTPA or not to protect ...

JUSTICE #3: Assuming that's were true, what about question three?

MR. WRIGHT: Well, what ...

JUSTICE #3: If, if you pop-- and missing the due policy had prejudice provision which I understand in the policy doesn't put the policy is in Carwell Cruise case did.

MR. WRIGHT: Right, If prejudice were required, the third question is whether the notice of-- that the felon had been served is enough to defeat prejudice as a matter of law and the answer to that question has to be "No" because of the same thing stated in waiver not in ...

JUSTICE #3: Could it, could it undefeated in-- as a matter of fact -

MR. WRIGHT: Well, ...

JUSTICE #3: - could it be enough to tried, to tried that issue was there prejudice and lack, lack of prejudice. Won't you consider all of facts?

MR. WRIGHT: Well, in a hypothetical case, yes. And summary court of appeals [inaudible] that mark that all state case. Well, the felon

must prepare-- well, I think I have a point of them but to ensure when it all stays two, three times and talk in person to the agent and the agent said "It's all men taking care of." Well, in that circumstance the Insurance Company knows they're been there asking for their help about the suit.

JUSTICE #2: So that's not question of law, but could be a question in fact and in-- I guess it shouldn't be implied in a policy to this amendment. Your views well.

MR. WRIGHT: Well, my view is certainly know that-- like this Court said in Futaiet, if you're going to start realize the insurance policy, it's one of really that the board of insurance or the insurance department and the legislature, the bodies that charge for that kind of [inaudible]. But in this case, the reason that prejudice-- the collector prejudice is not established and we think prejudices is established that it required as a matter of law is we have no authority to answer for him.

JUSTICE #2: I am-- there was a survey of other states and amicus and you got to do you're opposing Counsel mention Washington, New Jersey-- what, what is that? Where is Texas stand in the nation with respect to whether this duty do notifying form you know prejudice?

MR. WRIGHT: To my reading most of those cases have to do with the fairer cooperate after the sub-papers of argument turned in but then something else happened and the user's disappear whatever fact. That's the scenario in the case that--which hooded them by implement critics that official to talks about that cenetened implement is never been sided since and so -

JUSTICE #2: Is it important at all that we tried to branch out in mind with what's going on matter or what's happening nationally on-- from this three question for a -

MR. WRIGHT: I know that this Court likes to take a look at that. The insurance industry in Texas is uniquely regular and I think the court needs to take that into account. In this Court has a lot of over dunned precedent. They controls this case but this were case where there's no controlling precedent nothing else had been written in this Court wanted to, to step out I could understand that but I don't know if any Court, any states that imposes its antesinc duty to find an additional insurer specially one who doesn't want to communicate or like to have in this case and advice another potential right. This case is not a good case for the imposition of that. The other point of your phrase in our brief is that there are no circumstances like the Court said, "You can do it." Should National Union they required to pay a default judgment, a judgment that's taken without an actual price. I mean, in the answer they gave us well, or was an actual price, it is. It was an actual price and a defense part of it. But the defense further establishes that Mr. Morris was not negligent and yet the trial judge apparently according to the colloquial who took place in front of Judge Parkerson. The state trial judge had already arrange this with the plaintiff's counsel. That's what the plaintiff counsel said that Judge Parkerson we talked about this and judge said rough let me hear the evidence and then I will give you default judgment [inaudible]. It's just happens to be in a manner of policy. This isn't right, this case has all the humor of the set up of-- defense counsel goes to the deposition, Mr. Morris is talking to plaintiff's counsel. Plaintiff counsel then tells defense counsel all this follow lawyer waiting all to call back. But what's that design to do? That's designed to stop him from trying to represent Mr. Morris. That's like if you're in an interrogation and you told the police "I'm not a liar," which goes of

...

JUSTICE: That, but that-- that's ought-- I agree. That's always we read the script here. You come to have a copy and I'm-- for ways certify him, for ways-- they're going to say-- plaintiff may say, "He know of you," fall over furious we're not neglect anything from you and we take care then on a none corporation clause, can we?

MR. WRIGHT: Well, the none cooperation clause who doesn't even intended to recount until the fellow attorneys and the papers and I ask for some certain defense. So you know -

JUSTICE: What if we say-- but if we-- if you said you know, you got somebody being this bad as you say, "He's been here." Even if you said well, theirs duty to tell everybody what we have-- will cover you your doubt to those-- cover just an additional insurer. May say, "No one afford that it had cut a deal with plaintiff's attorney", then even if you have the duty, you fulfilled your duty, you can still abort the bad guys for none cooperation.

MR. WRIGHT: Sure, as I come forward in confess that they cut a deal ...

JUSTICE: Which it-- which time I argue with basically do but tell me, "I don't want to talk to you, I'm the only who talk to the plaintiff's attorney."

MR. WRIGHT: Well, then,-- you know that's [inaudible].

JUSTICE: That's look a lot like none cooperation thee.

MR. WRIGHT: Well, that's, that's exactly what we have here but that's what-- you know, the cases taken a different term because of the ruling in the federal court and deserve the casing from the, the Socrate. But this question basically have to be answered "No" as this Court wants to stick with what had said in waiver which are no good reason to change.

JUSTICE: Other, other questions? Thank you Counsel. The Court is ready to hear argument from the appellee.

JUSTICE: May it please the Court Mr. William Schmidt altered by argument for the hour.

ORAL ARGUMENT OF WILLIAM C. SCHMIDT ON BEHALF OF THE RESPONDENT

MR. SCHMIDT: May it please the Court. Initially I'd like to briefly highlight some of the findings the official of the court and the District Court in San Antonio the Federal District Court of Trial Court. To get some context to the issues that we're discussing. First of all the appellee prior stands in the shoes of the insured Richard Morris, the employee granted their two inconsistent judgments in the underlined litigation but the issues in this litigation with National Union concern only the first judgment. The first judgment that was prior in time which is the judgment of the Crocker has against Morris, the employee. It was also found that Morris was entitled to indemnity and the [inaudible] the policy. This is undisputed in fact it's documented in the records of National Union.

JUSTICE: Let me take you to questions about my and -

MR. SCHMIDT: Yes.

JUSTICE #4: - I ask you if there is a duty under question one, what is it?

MR. SCHMIDT: Well, if there's any duty for corroboration which is part of the policy, that duty cannot be exercise until the parties of

where of the benefits under the policy.

JUSTICE #4: This are they wants to know from us, is there a duty? And I assume you think there is.

MR. SCHMIDT: I do think there is, your Honor.

JUSTICE #4: And so I'm wondering what it looks like. What's this-- when did Bridget when does it kicked in? How do you know one of the plashed-- what did-- what is that duty? What would we say that duty was?

MR. SCHMIDT: Well, initially I would have to say that the duty is to advice and unformed to ensured that he has coverage under a particular policy -

JUSTICE #4: Just -

MR. SCHMIDT: - which Judge Benedicson rights, duties, and responsibilities are spelled out in the insurance policy.

JUSTICE #4: Which one you would go through to follow the insurers policy saying in the additional insurers are course to be omnibus insured. It she would be no bad 'cause it not even identified and then would you write them or call them?

MR. SCHMIDT: Well, I, I think that the duty arises certainly at least by that time that the insurer is involved in a litigation with a particular insured -

JUSTICE #4: And?

MR. SCHMIDT: - and I don't think there's any extra conjuncture duty to go notify all omnibus insureds of-- and given the copy of the policy -

JUSTICE #4: Well, that-- some asking you -

JUSTICE : The [inaudible] was no. Is there a duty?

JUSTICE #4: - Inspector is not. I just want to know what looks of views-- is there a duty to do that or only if your sit on this deposition or with the person or what, what it-- what is the duty?

MR. SCHMIDT: I think once the unknown insured-- an insured known to the insure becomes involved in a litigation then it end-- it's patently aware of the insurer or it's patently aware that the insurers are unformed and has no idea about this policy there's a duty then to inform that insured within your involvement in litigation that there is coverage.

JUSTICE #4: Before they served or after they served?

MR. SCHMIDT: Well, certain like once the insurer becomes aware of service there's a vocations ...

JUSTICE : Cause we, we've said in default judgment, do you have any contact? Being aware of a lost and blaming somebody that it mean yet do a thing. Tell you're served, you have absolutely no duty with regard to pending losses.

MR. SCHMIDT: That's correct.

JUSTICE: So your duty arises then when you find out that-- you know, in this context employer at-- plaintiff had sued both the employer which were they represent and the employee and you learn that the employee has been suit, has been served. Then you have a duty to call them up write him -

MR. SCHMIDT: Well, ...

JUSTICE #4: - tell him we understand you've been served six months ago and we haven't got any papers from you. Would you like to send the papers to us or-- is that?

MR. SCHMIDT: Well, of course in this instance, the insurer had a copy of all the papers already because they were actively involved in a litigation represent the ...

JUSTICE: But in damages, it will-- he never corded or he never

gave notice to the suit to them.

MR. SCHMIDT: That's correct.

JUSTICE: And so it still that's-- in your view, that's purely a-- did he gain notice of-- once they gain notice, they has a papers in fact the insurer has no duty to send the papers.

MR. SCHMIDT: Well, they are certainly insured has no-- has a duty not to confound or impede the ability of the insurer to represent him.

JUSTICE: So when is it breached you got a duty to inform as a certified letter enough that's never answered?

MR. SCHMIDT: Well, the duty to inform is for as the insurer-- to inform the insurer once the insurer becomes aware that they're insured acknowledge to be-- a covered insured once I know that he is in litigation and they know where he is they have and they're involved in that same litigation they certainly have a duty to -

JUSTICE: So can I send a letter to the house certified mail and satisfied the duty that way is that? Or that satisfy the duty?

MR. SCHMIDT: Well, I think the duty as along with the definition of due diligence defense on the particular facts and circumstances. In this particular case because of a medical condition, he had trouble reading so maybe that would not be an-- a fair way to communicate to him but nothing to do is to take reasonable efforts and reasonable efforts should be the [inaudible] particular facts and circumstances when the attorney hired by the insurer is sitting in the flat yard having a conversation granted under ceiling testimony but having a communication and conversation with the unaware insured.

JUSTICE: He's refused to pay with him?

MR. SCHMIDT: Well, a, I -

JUSTICE: Well, he's client -

MR. SCHMIDT: - I disagree with that, your Honor.

JUSTICE: - his client-- who's that lawyer or duty to ...

MR. SCHMIDT: Well, according to ...

JUSTICE: National find interest [inaudible] yours client did defend of comparable?

MR. SCHMIDT: He, he has duties both but at-- its, its admitted by -

JUSTICE: What kind of duty does he oath to the Insurance Company?

MR. SCHMIDT: He has a duty to keep them and inform and uprise that's the other proceedings. They admitted to that. National Union admits to that.

JUSTICE: Well, proceed.

JUSTICE #3: Of all the proceeds.

JUSTICE #2: So he has record in gestures duty to the court?

MR. SCHMIDT: Exactly.

JUSTICE: So he is-- but its of course, making representation that he want-- he only has duties to disclut.

MR. SCHMIDT: Well, the National Union takes a position that Mr. Morris was uncooperative because he didn't respond to our phone calls. This phone calls had been made by the same attorneys in Sidney Australia or asking him questions. How can he have at both ways that we're chu-- we're doing our responsibility to-- and do send to communicate with us but then I doubt to communicate with them when they're standing in this jury process.

JUSTICE: Why is it the duty on the employer to inform its employees internal litigation and a need to cooperate, because their insurance for this catalogues wasn't the duty there?

MR. SCHMIDT: Well, perhaps recently but the reason of employer-employee relationship the time has litigation has filed. He was fired



shortly after the incident.

JUSTICE: Oh, it's still seems to me they got an employer who'd I assume by for this premium to give coverage for itself and its employees then did much easier for the employer to say, "Look your fire," because of-- whatever you did but we have coverage for this. You need to cooperate with insurance carrier who never make but just get a lawyer. That seems to me there is a duty-- that the duty would lie there and not to the insurance carrier who has look up all this main-- additional main construed as course of their investigation.

MR. SCHMIDT: Well, I'll respectfully disagree then maybe a [inaudible] or hundreds of omnibus or additional employees who are insured under the policy but there's only one additional, additional main-- excuse me-- additional employee are insured omnibus who's in bottom of this litigation where the -

JUSTICE: When they ...

MR. SCHMIDT: - the coverage concern to play.

JUSTICE: When they insured, that isn't meant they have to [inaudible] familiar the employer with being through them and employee would-- could they have it that point before contracting be insured answer for this omnibus insured before they have any contact with them?

MR. SCHMIDT: No, I think they do have to get his permission but we have to have communications. It's a simple contract law this Court stated in the 1994 condition, case of the Fernandez. Insurance policies are just contracts that are subject to the same rules of application and construction as any contract and-- if there is some author which is obligated to made other insurance policy an author to provide coverage at the expense of the insurer then that offer has to be communicate you cannot accept or decline an offer until it is communicated.

JUSTICE: Well, not-- I think that what the problem which you say is an-- it's a contract and their positions understand the contract doesn't say, "We have to go make this information known to an omnibus insured," even they've sued, if they did sued, they have to rate us, there's no coverage until they get the papers to us, I-- is in fact what were argued about here and you're saying its-- I thought-- It seems to be like your statement just fit in their position. But It may something you say.

MR. SCHMIDT: Well, I'm not falling your logic [inaudible].

JUSTICE: Did you say that the policy has a probation in requiring the insurer to take some action before proceeds the sued case? Thus the policy have any probation and they're requiring the insurer to take any action to this omnibus insured that's in this law sued before that insurer takes the paper or gets the paper to the insurer.

MR. SCHMIDT: No, but they have a duty to investigate the client.

JUSTICE: The question was, is there something the policy that says that? Because I-- we were talking about the policy-- we talking about.

MR. SCHMIDT: I don't think to that specific probation ...

JUSTICE: There is a specific probation sigh before there's coverage. You have to get the papers to us, that isn't the result.

MR. SCHMIDT: Well, if -

JUSTICE: Are we not-- are we not doing what counsel says we'll be to take bias and include that policy or ...

MR. SCHMIDT: No, I don't think so your right, your Honor because as a contract of any contract governed by the rules of application of all contracts, there has to be a meeting of the minds. If Morris-- the additional insured is supporting to that contract, he needs to be apprised of the conditions of the contract. He needs to be made aware of that contracts.

JUSTICE: Let me ask-- can let me ask you about that? Were you the trial counsel put the plaintiff?

MR. SCHMIDT: I was, your Honor.

JUSTICE: So of course, one of the first things you asked for in the litigation was the policy.

MR. SCHMIDT: That's correct.

JUSTICE: And you know more it was covered?

MR. SCHMIDT: That's correct.

JUSTICE: When you met with them did you tell him he was covered and they would supply in the defense?

MR. SCHMIDT: I did not. He was an advisory of [inaudible] that appropriate for me to advice him.

JUSTICE: But you know about the non-notice provisions things like that, that there were things that he, he didn't cooperate with the other side you know you were going to get a money at him personally?

MR. SCHMIDT: That was fairly appearing.

JUSTICE: He knows all the way he were collect of two million dollars or have much was default judgment was writ of that policy was enforce but you knew he had to give notice, why didn't you tell him to give notice?

MR. SCHMIDT: Again, because I was in advisory, I was an appellant and it happens that [inaudible].

JUSTICE: So what-- somewhere have was she was stopped. Aren't she was stopped from saying they should have give him notice if you [inaudible] as many of the facts and know what had to happened and get some it.

MR. SCHMIDT: I'm not a part to that contact.

JUSTICE: I know but its-- you're actively your client, I mean you're, you're blaming them for doing what you had all of the same facts and knew what have to happens and in fact by not telling them invited them not to sent them any kind of notice.

MR. SCHMIDT: I'm not a party to the decision and thought process is of the insurer to line it up providing coverage.

JUSTICE: What if-- what if the-- if Mr. Morris in this case and maybe [inaudible] case didn't want to-- it's not that he was not wanted to cooperate he just did one thing to do it. It will contacts him, I will talk him right. He's not say, "I don't want to cooperate," but the effect of this [inaudible] he just, he just doesn't do anything and so you run out-- run out of options there so its a plainatorious well, I guess I just go assertive and he's not doing anything, I just default him.

MR. SCHMIDT: Well, again, this is a, a man who is unsophisticated in policy or at-- he does make some effort, he calls an attorney.

JUSTICE: But I mean this-- just take it the examples -

MR. SCHMIDT: Okay.

JUSTICE: - he just doesn't wanted-- that when any involved at all. So he doesn't do anything the default judge was takes but all-- I'll say him my judgment. You go guess the interest [inaudible] that the insurer gains reported, the insurer [inaudible]. Is that what's happening here?

MR. SCHMIDT: That's not what's happening here there is no dandy asylum of pollution and I think there is not a failure to cooperate on the part of Morris. He does attend this deposition he does provide extensive testimony.

JUSTICE: No. To follow upon justice, be sure the question is not-- if we're to answer this certain part question's "No," who would have an incentive to inform the unsophisticated and insured that they are

covered under the policy as an omnibus insured?

MR. SCHMIDT: Well, as the plaintiff's attorney, I might have an incentive but I don't think I have [inaudible].

JUSTICE: Have a huge incentive.

MR. SCHMIDT: Absolutely.

JUSTICE: But nothing were revenue. You may not have a duty to do it but absolutely no duty to your client for venture. Your duty to your client in fact encourages you to tell the gathered it coverage, doesn't it?

MR. SCHMIDT: I don't think but I can provide him with legal advice

-

JUSTICE: I'm not asking to.

MR. SCHMIDT: - and advice concerning his coverage of their policy.

JUSTICE: Are you doing your duty to your client so in Mr.-- what's his name?

MR. SCHMIDT: Morris?

JUSTICE: Immediately-- uninsured or insured? Which way your client is better of?

MR. SCHMIDT: Well, obviously they had insurance, there ...

JUSTICE: So in [inaudible] city, your client is the-- make sure this kind of?

MR. SCHMIDT: Well, we did have information on the policy specifically whether or not a covered Morris because ...

JUSTICE: You didn't ask her the policy first thing I thought that's what advised?

MR. SCHMIDT: We did get a copy of the policy but the policy was provided in response to questions such to what coverage was available for the employer? For American's entity? There is no responses whether or not this policy covered the individual employee. And again, I'm not a part of the fact processes of the Insurance Company.

JUSTICE: I disagree that the juries take nothing for the coverage of the employer and Mr. Morris for only the employer.

MR. SCHMIDT: All of the employer because Mr. Morris at that point and time is no longer a part of the action. The trial [inaudible] case with Morris unattended part of the action all the way through the plaintiff's evidence. It was after the close of the evidence and before the argument during the charge factors were-- I asked the court not to predicate the findings of damages or a negligence finding because as said, your Honor as you know, I had a motion for default judgment, pending, and this is my proof here and I need damages that establish not withstanding fine of negligence and that's what the judge-- it wasn't upon my motion. That's when the judge-- the trial judge said, "Well, I will do you is I will branched to you the default judgment," and based upon the evidence heard-- already heard by the Court of our damages and the amount of one million dollars. And the-- then, so yes?

JUSTICE #2: So Mr. Wright says the, the jury's defense for recovered both employer and employee, he just lotly dispute that?

MR. SCHMIDT: Yeah. The finding of, of negligence which came after the default judgment covers the actions of the employee. I, I, I stated in some inconsistent burden but not hear on comparing the two purge where you own collecting on this default judgment which it was occurred because the National Union failed to come and defense of its admitted covered insured.

JUSTICE #2: If there something different about the relationship between an insured-- liability insured like this and the omnibus insured, that we should impose a duty beyond that expressly said out in the contract of the insurance.

MR. SCHMIDT: I think the duty arises at basic contract law as exactly deny a tremendous case.

JUSTICE #2: Okay. So your, your position is not-- that there was special relationship. It's just basic ordinary everyday contract law. It made them requires damn to go and tell somebody else what their rights made under the contract.

MR. SCHMIDT: I think there's going to be an incident first, and certainly when there is at litigation, it's defend and upon the insurer. The first step is to determine whether there's coverage. Was is done, done in the code of scope employ and collect? Once they make that determination which they did and specifically stated in their files that Mr. Ramondalo would represent Emiritus and Mr. Morris and once that determination was made, you have a duty to make sure that the contract that they received the benefit of the [inaudible], you have to make sure that that contract can be executed and the only way can be executed is for the insured to have knowledge of, of this policy, knowledge of the existence of his Insurance Company. You cannot hear the them with unknown institute.

JUSTICE: Is there any further questions? Thank you Mr. Schmidt.

MR. SCHMIDT: Thank you.

REBUTTAL ARGUMENT OF THOMAS C. WRIGHT ON BEHALF OF PETITIONER

MR. WRIGHT: May it please the Court. We'll now have another reason to answer this questions "No" and that is a reason imposed I think by Justice Brister and Justice Jefferson. We need to incentifies everybody who involve do not try to proceed on the state on default judgment. This Court offer a court default judgment. Nobody likes it not even in sports when you know, some they can't show up or whatever. Default judgments or the verdict exception and a reason that Mr. Schmidt had-- tell me not attribute reasons to him personally. The reason that their plaintiff's lawyer might want to hedge his batches because I know this case is difficult. They sworn a fee application that's in the record not a notice court that have much of the record but they swore on their fee application that this kinds of cases are difficult because it's basically slipping fall and so by having Morris out there, he has an answered on the possibility of taking in default. They have two ways they find to give at the insurer. One if they can stick Emiritus the other is go through this default. But if this Court declines to impose this extra contractual duty on National Union then the plaintiff's bar will be incentify to make this person go, get coverage to say "Look send your papers and I'll give you an envelope and I may give you an a legal advice but here's the address, send it to this people maybe something good of that."

JUSTICE: Now Mo-- Morris was an employee on this facility, correct?

MR. WRIGHT: Yes.

JUSTICE: But why wouldn't a duty beyond the, the company that pay for the premium to inform its employees of this coverage?

MR. WRIGHT: Well, I think it should be. Unfortunately their not in this law soon but if you going to step back and say, "Two of all the people around all they have this duty" never once who know that they're employees are and they thought that insurance not just for the employees of course, they want the employees to covered because if

their employee start their stock, and they respond at superiors so it's in their business to make sure their employees are dependent.

JUSTICE #2: When you asked about the rule among the-- around the states, what was the majority rule with regard to prejudice? Is that Texas insurance industry was uniquely regulated which suggests that the majority rule should be that persuasive or influential whatever it is. What of this unique regulations in Texas that relate here?

MR. WRIGHT: Well, I don't-- I don't understand the question you've talking specifically about prejudice because there is a-- you know, developing majority rule about prejudice. Prejudice comes in to play though after something that trigger. Well, this Court in-- they sure could have said many times until the suit is served and ordered to the Insurance Company there's no duty at all so if you're talking about prejudice then we do have the board order. Now the board order though in my view it doesn't apply this policy although this was not delivered in Texas and thee-- the board order then does not talk about this interesting duty. The board order will talk about the situation were more externduos papers in late and then we try to defend against Morris on the, on the basis of this notice provisions on the policy. That's not what happened here. Mrs. Proctor may stand and Morris has used for the suit 'cause she does not stand an issue to be [inaudible] Insurance Company of a-- afterwards and of course, Morris never gain any, any notice at all. So that's-- but-- and I guess I'm saying that in this arena, the Texas insurance commission has some regulations that you know, are out there that could have addressed this if they wanted. And I just-- why I think this Court are leave it up to the board, you can investigate all of this. You can take testimony about what happens in thousands of cases and decided if they're all to be some new policy provision imposed on Insurance Company. In that way, you know the board would be this free flowing duty or will be something that require to be written the policy. So the Insurance Company can pick up the policy and see what their duties are.

JUSTICE: Let set the insurance defense further exonerates only the [inaudible].

MR. WRIGHT: Well, I-- I'm just reading the chart, your Honor. The negligence question says, "Who's negligence, if any are did the negligence of any amended the following," and in this case the jury said, "No" it's the both parties and Emiritus have said. Emiritus including its agents acting within a scope of their foreman. They warn anybody else that Emiritus he was refuse for being anywhere nearer Mrs. Proctor [inaudible] so that's why I say [inaudible] exonerated Mr. Morris because his conduct was submitted to the jury even though he's main [inaudible].

JUSTICE #3: If it is after the fact they're assume mixing apples and oranges. You got a default and a reason for default 'cause someone-- whoever is in chose to ignore the, the lost you did brings of them into the action so that's the punishment?

MR. WRIGHT: Well, I, I don't believe it was actually the fact. We referred that-- I believe our the counsel was saying that its a State Court announced that he was going to [inaudible] the default rule. They did not sign the default rule till I . Now of course, the judgment it was based on-- taking out the judgment based on board opinion after the default judgment but by the time, the default judgment receive they knew they have loss the case and of course, if they get won the case, they were proper taking the default judgment.

JUSTICE : Do you ask its Court and answer the questions for five

...

MR. WRIGHT: No, and thank you, your Honor.

JUSTICE: Thank you Mr. Wright. The case is submitted that concludes [inaudible] for this morning and the Marshall will now adjourn this Court.

JUSTICE: All rise, Oyez! Oyez! Oyez! The Honorable [inaudible] Texas [inaudible].

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