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Supreme Court of Texas.
Offshore Specialty Fabricators, Inc., et al.
v.
Wellington Underwriting Agencies, Ltd., et al.
No. 08-0890.

September 14, 2010.

Appearances:
Harry Lloyd Scarborough, Faubus & Scarborough, LLP, Houston, TX, for petitioner.
S. Shawn Stephens, Baker Hostetler, Houston, TX, for petitioner.
Glenn R. Legge, Legge, Farrow, Kimmit, McGrath & Brown LLP, Houston, TX for respondents.

Before:

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

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ATTORNEY S. SHAWN STEPHENS: May it please the Court, Your Honor, my name is Shawn Stevens and I represent the Houston Exploration Company in this appeal. There are two questions presented by this appeal. The first is whether this insurance policy covers standby repair claims that were incurred by repair vessels waiting on storms to pass through the Gulf of Mexico. And the second issue is whether the Court of Appeals erred in creating through implication an exclusion for standby costs that wasn't written into the policy. So before we go into that exclusion by implication question, let's look at what was actually in this policy.

JUSTICE DAVID M. MEDINA: Is this an all-risk policy?

ATTORNEY S. SHAWN STEPHENS: It's an all-risk policy, yes Your Honor.

JUSTICE DAVID M. MEDINA: It covers everything?

ATTORNEY S. SHAWN STEPHENS: It means that anything that falls within the scope of the insuring clause in this policy is covered unless it's specifically excluded.

JUSTICE DAVID M. MEDINA: And these weren't excluded, but there was a line through it, right?

ATTORNEY S. SHAWN STEPHENS: It was not excluded from the two-page list of exclusions in this policy. Furthermore, the insuring clause in this policy is quite broad. It says it covers against all risks of physical loss or damages to the jacket and leg pile of this platform and to damages as long as they arise out of the occurrence. Well, nobody in this case disputes the fact that the damage to the jacket and the leg pile was an occurrence. And because these repair costs arose out of, to use the language of the insuring clause, they're covered by that. Now, furthermore, once one puts the gloss of this Court's Utica decision in 2004, this Court's Evanston v. Atofina decision, and this Court's Mid Century v. Lindsey decision on top of that saying where an insurer or an underwriter uses the language arising out of in the policy, when there is a causal connection between the loss, the physical peril, the covered peril and the damages, those damages will be covered.

JUSTICE DAVID M. MEDINA: What if in the situation here where we have a mark-through, what does that do, if anything, to the policies? Does that work as an exclusion?

ATTORNEY S. SHAWN STEPHENS: It does not. There are at least, I can think of at least six reasons why that's not an exclusion to coverage in this case. And we can talk about all of those. I do want to point out, however, that this policy has two indemnity clauses that apply to show that this causal connection between repair costs exists with these covered perils. And that's Section 1A that we have discussed in our brief, which allows for the recovery of all costs that are incurred, that are reasonably and necessary incurred in the repair, and then 1D that covers all vessel charges, including these standby charges for vessels that were used in or about the repair, and that the policy also has a standby deductible in it. So it was contemplated by these parties that these types of coverages would exist here. So, that really takes us on into the second issue, and that is was this an effective exclusion; this attempt to exclude that Underwriters say they did by marking through paragraph 13. And there are several reasons why the Court of Appeals erred in holding that that was an effective exclusion.

JUSTICE EVA M. GUZMAN: The Court of Appeals seemed to rely on Gibson and some language in Gibson to conclude that, in fact, they could look to the stricken language in construing whether or not the standby charges um ---

ATTORNEY S. SHAWN STEPHENS: That's correct, Justice Guzman. In fact, that's one of my six reasons why the Court of Appeals erred here, because Gibson doesn't really stand for the proposition that the Court of Appeals held that it did. In Gibson, that's a case from 1956 out of this Court, and they've cited it, the Court of Appeals cited it for the proposition that you can consider deletions from a policy in determining whether that's been excluded.

JUSTICE EVA M. GUZMAN: Well did they look at the deletions as circumstances surrounding the execution and picked up on language from Gibson and ---?

ATTORNEY S. SHAWN STEPHENS: You know what, Your Honor, it's a rather dense case. It goes through a long explanation and look at the jurisprudence in Texas, but then, ultimately, the Court says this on page 788 of the Opinion. It says we cannot conceive how parties could draw a lease in any clearer language than that used here. And it relied on the fact that the language in this policy was clear, unambiguous, simple, and plain. And so it says in the case that it was actually relying on the language in that lease. And further underscoring the fact that this Court refused to rely on surrounding circumstances or external evidence in determining what the lease covered there is the fact that it relied on it's prior Self v. or that this Court relied on its prior Self v. King decision, an 1866 decision that says we're not going to add words to or subtract words from a written agreement. And so that's, really the fact is here that this exclusion should have been in writing.

JUSTICE EVE GUZMAN: So we should look at the language in Gibson as mere dicta I suppose?

ATTORNEY S. SHAWN STEPHENS: On this point, yes. Yes. And then we have an additional gloss that wasn't in Gibson in this case, and that's the fact that this is an insurance policy. And as this Court told us in the National Union v. Hudson case, when you have, when you are desiring to exclude something from a policy, especially, Justice Medina, an all-risk policy, you have to specifically do that in writing. This Court said it must be expressed in clear and unequivocal language.

JUSTICE NATHAN L. HECHT: There is a lot of strikeout in this policy.

ATTORNEY S. SHAWN STEPHENS: There are a lot of strikeouts.

JUSTICE NATHAN L. HECHT: A lot of them.

ATTORNEY S. SHAWN STEPHENS: It's like they took a form and marked through parts of it. Yes, Your Honor.

JUSTICE NATHAN L. HECHT: There's a whole section on liability struck. That doesn't mean anything that it struck out?

ATTORNEY S. SHAWN STEPHENS: Your Honor, it can't - it can't - those things can't come back in to alter the terms of what are written in the agreement. And let me tell you why. First of all, this Court has told us that if you intend to exclude, you have to do so in writing.

JUSTICE NATHAN L. HECHT: Well, the strikeout is in writing. I mean maybe - I think your argument is it's ambiguous because ---

ATTORNEY S. SHAWN STEPHENS: It's certainly ambiguous because the writing also has to be clear and unambiguous, as this Court has told us.

JUSTICE NATHAN L. HECHT: But it is in writing. It is in writing. There's a defective part exclusion buyback endorsement.

ATTORNEY S. SHAWN STEPHENS: There's cer ---

JUSTICE NATHAN L. HECHT: It's all struck out.

ATTORNEY S. SHAWN STEPHENS: There's certainly - that's correct. That's correct.

JUSTICE NATHAN L. HECHT: Doesn't that mean that they don't intend to provide that coverage?

ATTORNEY S. SHAWN STEPHENS: Well, Your Honor, this, what we do know is that this sophisticated group of underwriters knew that if they wanted to exclude something that they had a place in the policy to do that, and that's the exclusion provision. In fact ...

CHIEF JUSTICE WALLACE B. JEFFERSON: What if instead of being stricken it was simply deleted and that language was simply not there?

ATTORNEY S. SHAWN STEPHENS: Your Honor, that is, I think that points out one of the fundamental issues in this case. If they had taken the time to take the things that remained in the policy and put them in a different document that excluded excised to all the language that had been stricken, we would have no problem in saying that that language was external to this policy and was parole evidence and violated the merger doctrine

by coming back in to alter the terms of the written agreement. Here we do have a strikeout. We shouldn't be drawing a distinction between words like stricken and between words that are erased or otherwise excised and not available to look at. It's not.

JUSTICE DAVID M. MEDINA: Can we look beyond this contract perhaps to the negotiations that went on with risk management and the broker that placed the policy, perhaps that maybe was negotiations directly with the insurance carrier? Because a lot of times no negotiations okay, we're not paying for this, we're not paying for this, we're not paying for this, we're not covering that, and they do get strucken out.

ATTORNEY S. SHAWN STEPHENS: That's correct. In this case, you can't look to those negotiations. Neither party has argued that this policy is ambiguous. So as a result, you can't look to those external factors. The other thing is is that once the parties have agreed in writing, once the agreement has been reduced to writing, it would violate the merger rule to bring in prior drafts. This is essentially a prior draft. It never, that paragraph ...

JUSTICE EVA M. GUZMAN: Really, a draft? This is the document the, in fact, executed. I'm not sure that you can call the final agreement a draft.

ATTORNEY S. SHAWN STEPHENS: Well, it was made on a form. And I will remind the Court that this is a policy out of the London market. And THEC never saw this document until the discovery phase of this litigation. So it's not as though it were a policy on a Texas-approved form that everybody knows what it is, or that we had the opportunity to see before the loss. And to say, oh well we didn't mean to strike that out, nor does this mean that it's striking out standby coverage. What it means is we have to be especially careful to look at the language that is in this policy to determine where there's, that there's coverage. And in this case, I think the point behind all the questions is does the striking of paragraph 13 remove coverage from this policy when there remains in this policy an additional source of coverage. And I think ---

JUSTICE DALE WAINWRIGHT: Let me ask a factual question if it's established in the record. Is it clear or is it disputed that the strikeout of paragraph 13 was agreed to by the parties, not necessarily the coverage, but of that paragraph?

ATTORNEY S. SHAWN STEPHENS: Your Honor, in this record it's absolutely clear. THEC never saw a draft of the policy, never saw this final policy.

JUSTICE DALE WAINWRIGHT: I understand that.

ATTORNEY S. SHAWN STEPHENS: It was never presented the opportunity as a result to reject standby coverage as some sort of an add-on. And, of course, it wasn't an add-on if you compare it to the language of the Terrorist Buyback and some of those.

JUSTICE DALE WAINWRIGHT: Let me rephrase my question. Was the language of paragraph 13, did the parties agree to take that out of the insurance coverage, even though your client never saw it until after the incident had occurred?

ATTORNEY S. SHAWN STEPHENS: No, they did not. This was supposed to be.

JUSTICE NATHAN L. HECHT: Well how did it get done?

ATTORNEY S. SHAWN STEPHENS: It was done in the London market between the Underwriters and their staff, if you will, their London broker who marked through it.

JUSTICE NATHAN L. HECHT: Well you say, you say Tysers may at times have acted in some respects on behalf of the assureds.

ATTORNEY S. SHAWN STEPHENS: That's true, but they were paid for their administrative services--

JUSTICE NATHAN L. HECHT: Right.

ATTORNEY S. SHAWN STEPHENS:--which would include this marking out and reducing the agreement to writing, or the policy to writing. That ---

JUSTICE NATHAN L. HECHT: Then I wonder in what respects?

ATTORNEY S. SHAWN STEPHENS: Certainly, Your Honor. And again, some of these issues, these agency issues have not been resolved factually and--

JUSTICE NATHAN L. HECHT: I'm just wondering in what respects?

ATTORNEY S. SHAWN STEPHENS: Well obviously they go, the local broker contacts the London broker, who is the only person authorized to then go to the underwriters.

JUSTICE NATHAN L. HECHT: So is he then acting on behalf of the assureds?

ATTORNEY S. SHAWN STEPHENS: There is a dispute over this agency question, so I will say it has not been resolved.

JUSTICE NATHAN L. HECHT: Let me ask you this.

ATTORNEY S. SHAWN STEPHENS: Yes.

JUSTICE NATHAN L. HECHT: Let me ask you this. Here is a statement in your brief. While Tysers may at times have acted in some respects on behalf of the assureds, it acted as underwriter's agent with regard to formation, investigation, execution and so on.

ATTORNEY S. SHAWN STEPHENS: That's correct.

JUSTICE NATHAN L. HECHT: And I'm just wondering in what respects did they act on behalf of the assureds?

ATTORNEY S. SHAWN STEPHENS: Well, Your Honor, it's our argument at trial that they didn't operate in any respect.

JUSTICE NATHAN L. HECHT: Under any respect.

ATTORNEY S. SHAWN STEPHENS: In any respect, but even--

JUSTICE NATHAN L. HECHT: Then why did you say in your, why did you say in the brief in some respects because?

ATTORNEY S. SHAWN STEPHENS: Perhaps I should have said if they did operate in any respect on our behalf in the drafting of this policy, in the assessing of the claim, they operated on behalf of the underwriters. But the real issue here I think is what still remains in this policy? And I think the United States--

JUSTICE NATHAN L. HECHT: Well part of the problem I'm having is if you go to your agent and you say well I need to buy some coverage, what should I do? And the agent said well here's a list of five things; tell me

which ones you want. And you mark through three, number three, and say I want these, then it seems to me that excludes, that means something, that's you've excluded it.

ATTORNEY S. SHAWN STEPHENS: Here's the distinction, Your Honor. There are two distinctions. One is you don't get to do that in the London market. You don't get to have the face-to-face discussion. The second thing is your question--

JUSTICE NATHAN L. HECHT: But your agent does; somebody's agent does.

ATTORNEY S. SHAWN STEPHENS: But here they were told to get all-risk insurance to cover this construction project. And we paid an extra premium during hurricane season when these standby charges are likely to arise and believed that that's what we were getting. But the second thing I want to say about your question is that it presumes sort of a named perils type of coverage. For example, homeowners or car insurance, it's the type of policy where you're given options under a Texas-approved policy. You're bringing, by paying premiums, bringing coverages in. This is an all-risk policy where everything is covered unless you specifically take it out of those coverages. And so what we have here is an overlap of coverage, even if you assume that paragraph 13 was somehow a source of standby coverage. In the United States--

JUSTICE NATHAN L. HECHT: But it looks to me like if Tysers was your agent for placement of coverage, which I understand that's not been determined--

ATTORNEY S. SHAWN STEPHENS: It's disputed.

JUSTICE NATHAN L. HECHT: -but if it were, then that casts this case in a very different light.

ATTORNEY S. SHAWN STEPHENS: I don't think it does and I'll tell you why. I think the 1938 Lanasa case, which we've cited extensively in our brief from the United States Supreme Court, answers your question. And that is in that case, there was a ship and it was loaded with a cargo of bananas. And the ship was stranded and before it could be floated, of course, the bananas rotted. And so a claim was made for the loss of that cargo. And the policy was an all, as here, it was a maritime situation and there was an all-risks policy covering perils of the sea. And I'll tell you that a peril, stranding of a boat is a peril of the sea. There was also prior to the loss of coverage, a rider that was added to that policy, which covered specifically decaying fruit due to stranding. And then prior to the loss, that rider was cancelled; it was taken out. And the insurer argued as they do here that that removed coverage from the policy. And the Supreme Court rejected that argument and said in that all-risks situation, because coverage remained; there was overlapping coverage. But removal of the rider did not remove the coverage that remained in the policy and there was no exclusion for it because the peril was covered, the stranding, and because the loss of the cargo naturally flowed from that covered risk, it was covered. And that's what we have here. We have a broad insuring clause; we have two indemnity provisions that show that these causes, these losses and damages that naturally flow from that covered peril were covered. We have a standby deductible here and so we know that they intended to cover it and we don't have an exclusion in the policy.

JUSTICE DALE WAINWRIGHT: Counsel, to circle back around and conclude the question that I had about this, three quick questions I think. I think they're quick. One, are you saying that your client did not agree to striking out the language of paragraph 13, regardless of the effect?

ATTORNEY S. SHAWN STEPHENS: That's correct. We had no knowledge of that.

JUSTICE DALE WAINWRIGHT: Your client did not agree to striking out that language in that paragraph?

ATTORNEY S. SHAWN STEPHENS: That's correct.

JUSTICE DALE WAINWRIGHT: Did your agent, Tysers agree to it?

ATTORNEY S. SHAWN STEPHENS: Your Honor, it's unclear from this record. I don't know the answer to that.

JUSTICE DAVID M. MEDINA: But you're also saying it doesn't matter, right?
ATTORNEY S. SHAWN STEPHENS: I think you're absolutely right, Justice Medina. It doesn't matter because we still have language in the policy that covers it. But I want to remind the Court that this is here on an interlocutory appeal, so only the legal issues of coverage are here before the Court. There are factual disputes that still remain at issue below, including another coverage provision, which is the sue and labor provision, which may still cover the policy, but this one would resolve the issues.

CHIEF JUSTICE WALLACE B. JEFFERSON: There are three questions.

JUSTICE DALE WAINWRIGHT: And her explanation just answered the third one.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions?

ATTORNEY S. SHAWN STEPHENS: Thank you.

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

ORAL ARGUMENT OF HARRY LLOYD SCARBOROUGH ON BEHALF OF THE PETITIONER

ATTORNEY HARRY LLOYD SCARBOROUGH: May it please the Court, my name is Harry Scarborough. I represent the petitioner, Offshore Specialty Fabricators. Much of what I wanted to cover in my three minutes has been addressed in some of the Court's questions. Obviously, the issue we're here to decide today is whether deleted language may be considered in construing an otherwise unambiguous insurance policy. I think there is some clear public policy reasons why it should not. But I think that fundamental question raises two issues that we could focus on to guide us towards the proper answer. The first is what is a deletion? As was raised, I believe, in Chief Justice Jefferson's question, what is the difference between striking something through with a pen, marking it over with a black marker, going over it with whiteout, tearing it off the page and throwing it in the wastebasket, or as in the case of modern contract drafting, saving it as a prior version and in the new version not including the language at all. It's pure happenstance that we have the opportunity today to go back and look at what the parties deleted in the form of paragraph 13. Had that not been left on the page with a strikethrough, no one would argue that it was appropriate to go to the wastebasket and pull out a prior draft of the contract and say here, here's what we didn't include in this contract.

JUSTICE EVA M. GUZMAN: Unless it was ambiguous-
Attorney Harry Lloyd Scarborough: Unless it was ambiguous, correct, Justice Guzman.

JUSTICE EVA M. GUZMAN: And no one here contends we have an ambiguous.

ATTORNEY HARRY LLOYD SCARBOROUGH: No one contends. And that draws me to an important point which is rather than obsess about what the parties intended in deleting language that is not part of the contract, shouldn't we focus on the language that's left in the contract and decide on the face of it what it was that the parties intended to cover and not cover?
JUSTICE PAUL W. GREEN: But what if the parties instead of striking it out just added a sentence, handwrote it in and said not withstanding what's described in paragraph 13, it is the intention of the parties not to include a standby of losses in coverage?

ATTORNEY HARRY LLOYD SCARBOROUGH: And I believe that's the law in Texas and that's the pre-

ferred methodology under an all-risk policy of covering and not covering things. Once you have a broad, all-risk insuring clause, the appropriate way to exclude coverage for an incidental expense related to a loss is to say we don't cover it.

JUSTICE PAUL W. GREEN: You don't see an equiv, there's a similar kind of expression shown by the parties by simply striking it out and initialing the strikeout?

ATTORNEY HARRY LLOYD SCARBOROUGH: Well, all parties in the case agree that deleting paragraph 13 had the effect of taking it out of the contract. But as the trial court noted in its summary judgment order, you have to start reading tea leaves and chicken bones to figure out well what was really intended by deleting it. Was it deleted because it was superfluous or surpluses language because other aspects of the contract may have covered it? Was it deleted because they wanted to get rid of the sub-limit? All of those questions start to arise when you start reading language that's no longer part of the contract. You start delving outside of the four corners and you get into this guessing game.

JUSTICE PAUL W. GREEN: Well I know that both parties have indicated that they're not claiming it's ambiguous. But we could look at it and way well we think it's ambiguous. And it seems to me that that raises a question. It looks like there's a strikeout. The intent of the parties was to take it out.

ATTORNEY HARRY LLOYD SCARBOROUGH: But what is ambiguous? As the trial court noted, the only ambiguity is in the deleted language. If you disregard language that all parties agree forms no part of the contract, you have no ambiguity. You have only the remaining insuring clauses and the basis of recovery clause and then you can decide on that language whether or not there's coverage for standby. The policy doesn't say that it covers nuts and bolts, but there's no question that under a broad, insuring clause, if nuts and bolts are necessary to repair the damaged property, those are included. It's the same rationale here with the standby charges. The basis of recovery provision is very broad. In this instance, standby charges were necessary; there's no factual dispute about that. And so instead of looking at what's not part of the contract, we should look at what is part of the contract and decide whether or not standby when necessary would be included.

JUSTICE PAUL W. GREEN: But isn't that what's ambiguous, the fact that whether the standby coverage is there or not?

ATTORNEY HARRY LLOYD SCARBOROUGH: Not if you look, just look at the terms that remain as part of the contract. As the Trial Court noted, the only ambiguity is in 13.

JUSTICE DEBRA H. LEHRMANN: But, are you saying that if we were to find that it is ambiguous, then we would look to this, correct?

ATTORNEY HARRY LLOYD SCARBOROUGH: Well you would look to, you'd follow rules of construction that could raise a number of pieces of parole evidence. There's prior testimony in the record below on this issue, but none of the parties have advocated going into any of that parole evidence. Again, if you disregard 13 and you read only what's left, that's what you should review to determine whether or not there's coverage. It's when you start reading into what isn't there that it raises these questions that beg for parole evidence. Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The Court is now ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Legge will present an argument for the Respondent.

ORAL ARGUMENT OF GLENN R. LEGGE ON BEHALF OF THE RESPONDENT

ATTORNEY GLENN LEGGE: Good morning. May it please the Court, my name is Glenn Legge. I represent the underwriters that subscribed to the Welcar policy that's at issue before this Court. I would like to provide some contextual factual background that may enlighten the Court a little bit in light of THEC's comments concerning striking out the terms of the Welcar policy.

JUSTICE EVA M. GUZMAN: Will that include some of the facts that are disputed and not before us today?

ATTORNEY GLENN LEGGE: No, Your Honor. I don't believe they will. THEC is the, is an additional assured on this policy. This Welcar policy was secured by OSFI, Offshore Specialty Fabricators as the principle insured in the London market. Tysers is undisputed and I think that Justice Green was asking about this, the evidence that Tysers represented the interest of OSFI in negotiating with Underwriters. Clearly, Underwriters did not negotiate with themselves to form this policy. There was a party across the table from Underwriters negotiating the terms and conditions of this. Underwriters didn't pull this out of their back pocket and stick it to OSFI.

JUSTICE EVA M. GUZMAN: Are there some disputed issues of one agency and that, I mean really would it be appropriate to consider those factual issues if they're disputed when we're looking at the effect of the stricken language in paragraph 13 and whether or not that should be considered in determining the coverage issue?

ATTORNEY GLENN LEGGE: Absolutely and I want to address that question. We believe that this contract is unambiguous and am prepared to explain why we think that we prevail on that. However, there were comments from the Court earlier to THEC's Counsel about whether they were represented during the negotiations. There is undisputed testimony in the underlying, from the depositions of the Tysers' representatives that were at the table across from Underwriters that they represented OSFI in those negotiations, that the stricken language was done by Tysers representing OSFI in those negotiations.

JUSTICE EVA M. GUZMAN: Maybe they struck the language because they believed the policy provided for coverage in other places. If that language weren't there at all, would you still prevail on your argument?

ATTORNEY GLENN LEGGE: Yes and I would like the opportunity to tell you why. As Justice Hedges presented in the unanimous Court of Appeals decision, she first looked at the unstricken language in the policy, which is an absolutely appropriate approach here. She first looked at the covered perils clause, which was the all-risk clause that THEC has been emphasizing throughout this entire procedure. That says it covers physical damage that arises out of an occurrence. No question about that; we've never denied that. In fact, out of the $3.2 million submitted by THEC for coverage, Underwriters paid $2.3 million of it, which was for damage to the structure that occurred and to the repair that was made on the structure. We have never taken the position that physical damage to cover property wasn't covered under this policy or the repair costs, the costs of activities to conduct the repair for physical damage to cover property wasn't covered. Underwriters' position is that the cost of vessels that otherwise would have been involved in the repair, but were prevented and could not conduct repairs because of weather and were not on location, those charges aren't part of the covered event.

JUSTICE EVA M. GUZMAN: But Justice Hedges begins her analysis with sort of reliance on paragraph 13 stating that it strongly suggests that such coverage was not intended, and then she moves on to discuss how paragraph 13, which is the stricken paragraph, compliments subparagraph 1D. Then she finally concludes that the standby charges were not covered. So, really, her analysis is founded or grounded in the stricken language.

ATTORNEY GLENN LEGGE: And she certainly finds it what she calls decisive in the last three pages of the Opinion. But the first step she takes is to look at the all-risk policy, which says all-risks are covered subject to the terms and conditions of the policy. The next step she takes is she looks at the terms and conditions sections of the policy, which forms the coverage grant of this policy. It forms the boundaries of the policy, the scope of the policy. And she looks at subparagraph 1A in the basis for recovery section where it says that policy covers costs necessarily incurred or duly justified in repair and says this is not a repair. The cost that is being sought here for weather standby is for vessels that could not conduct repair and were not on location during the period

of time because they were prevented by weather. She then steps into and she looks at the Lanasa case. And that's very important. Lanasa and DeLaurentis are the Supreme Court and 14th Court of Appeals opinions respectively that were urged by THEC. Lanasa, grounding of a ship, rotting of fruit. That was an analysis of physical damage under an all-risk policy and whether really an ensuing loss, which is certainly something this Court is very well aware of, was covered under the grant of coverage of the policy, whether the damage, the physical damage to the covered property was too remote or attenuated to be determined to be caused by the occurrence, the grounding. Nothing about physical, or excuse me, nothing about delayed repairs or delayed reconditioning of the cargo. Justice Hedges rightly so said using Lanasa's explanation and the term they used, Justice Hughes used in 1926 was the real efficient cause. Look at the damage and what was the real efficient cause. And that has subsequently been acknowledged as proximate cause of the damage. What was the proximate cause of the damage? Well, keep in mind, we're not looking at damage, physical damage to the platform or the cost of repairs. Those have been paid. We're looking at the cost of weather standby charges when the vessels weren't and could not be involved in repair, when they were prevented from conducting repairs because of weather.

JUSTICE DAVID M. MEDINA: Let me ask you this question. I understand your position here, but I'm wrestling with how to look at this contract. I understand that sometimes you go to the Bermuda markets and you can negotiate a deal, you go to the German markets, you go to London markets. I understand reinsurance negotiating with these brokers over there and sometimes you have a risk manager and a broker and you're negotiating with the other side, and you reach an agreement in principle and then you go back to your offices and think you have coverage, but you're still waiting for the final policy.

ATTORNEY GLENN LEGGE: Sure.

JUSTICE DAVID M. MEDINA: Where were we in the stage of this loss?

ATTORNEY GLENN LEGGE: Very good question. That's one of the, I obviously got sidetracked. It was one of the first things I was going to try to tell this Court in the way of a contextual feel. THEC is correct. They're an additional insured on this policy. They didn't receive a policy until much later. And when I say a policy it has as you know, Justice Medina, has been stamped by the Lloyd's Policy Stamping Office and has all the seals and all that sort of things on it. That wasn't received until after the casualty occurred. However, Tysers, OSFI's broker, sent a copy of all the terms and conditions, including the stricken terms that were still in there. It was really identical to the policy we're looking at here. It contained all the stricken terms. It was sent to OSFI's local broker in the United States on July 22, 2002. It was prior to the casualty.

JUSTICE DAVID M. MEDINA: Excuse me, was the premium paid?

ATTORNEY GLENN LEGGE: I believe the premium was paid. I'm not, to tell you the truth, I'm not sure whether it was a premium over time where they pay quarterly installments. But OSFI's broker received the terms and conditions that we're looking at today, but the only difference is the strikeouts were done by hand whereas the strikeouts in the policy you're looking at are done by word processor or a type, probably a word processor. I don't know who has typewriters these days? That is the only difference. So I want to make sure that the Court appreciates the fact that at least the named insured had the full policy or the full wording that we're looking at today, including the strikeouts in July, some one month prior to the casualty and some five months prior to them submitting their invoices to Underwriters to make this claim. The Lanasa Court clearly looks at real efficient cause. Judge Hedges said the cause of the weather standby damages was solely cause, well she said the only cause was a delay in the repair and that delay in the repair was caused by weather.

JUSTICE EVA M. GUZMAN: And what consequences flow from a delay in repair?

ATTORNEY GLENN LEGGE: What you have is not an occurrence relationship. We're not a real efficient cause as the Lanasa Court would say, or in de-Laurentis, they defaulted or looked at what they called the proximate cause. But for two tropical storms and two hurricanes, you would not have weather standby charges. You

would not have a real efficient cause. The real efficient cause of the weather standby was not the damage to the covered property; that was paid for. Or the repair costs to the damaged property. The real efficient cause, the proximate cause of the weather standby were Faye, Hannah, Isadora, and Lily. And I'm afraid I don't know who was what. But that is your real efficient cause. There was a comment about a hurricane premium being paid. A hurricane premium being paid is, this is a floater policy you have for a year and you can dedicate various projects to it. In other words you just pay an additional premium as another project goes to it. In the summer-time, if you're going to build something in the Gulf of Mexico, your premium is a little higher. It's like having a wood house as opposed to a brick house or in a flood zone, not a flood zone. It is not because of hurricane standby charges. It's because of the chances of you having some problems or things getting damaged in the summertime is higher than in the winter time. I would like to address the Gibson case as Justice Guzman you got into that.

JUSTICE EVA M. GUZMAN: May I ask you just a question before that if that's alright?

ATTORNEY GLENN LEGGE: Yes, Your Honor.

JUSTICE EVA M. GUZMAN: This is an all-risk policy, okay.

ATTORNEY GLENN LEGGE: Yes.

JUSTICE EVA M. GUZMAN: And we don't have an exclusion, you agree with that.

ATTORNEY GLENN LEGGE: We do not have an exclusion.

JUSTICE EVA M. GUZMAN: But see the Court of Appeals looked at paragraph 13 to sort of decide that there was no coverage.

ATTORNEY GLENN LEGGE: Yes.

JUSTICE EVA M. GUZMAN: For the weather standby charges. So what is the fact that this is an all-risk policy and there is no exclusion. Let's just put that, let's just assume 13 is not in there and we have a clean contract. What effect does that have?

ATTORNEY GLENN LEGGE: Let me address that. Paragraph 13 was not an exclusion, was never nominated as an exclusion.

JUSTICE EVA M. GUZMAN: Let's just assume it's not there.

ATTORNEY GLENN LEGGE: Okay, it was, let me take in the context of say the defective parts exclusion, which is or no, excuse me, the defective parts term, which is still in the policy, and see if I can work through this. There's a, it's not stricken out. It says defective parts, coverage for defective parts is provided. As long as the defect meets I think three criteria of descriptions of the defect, that is forming the grant of coverage in itself from the policy. And that grant of coverage describes what is going to be covered and what's not. So if THEC submits a claim for a defect, but it doesn't make all three categories of the descriptive in the language; in other words, it says we cover defects as long as they're one, two, three and it makes one and two, but not three, is that an exclusion? No, that's mean, all that means is THEC as an insured under Texas law has the burden to submit a claim that's within coverage. If it's within coverage, then insurers have the burden to say I got an exclusion for that. We're still at that first phase because all those terms and conditions do is form the boundary or the scope of that coverage. If THEC comes in and has a claim that doesn't fit within that boundary of coverage, that doesn't shift a burden to us to say we've got an exclusion for that. We merely say this coverage doesn't apply to that.

CHIEF JUSTICE WALLACE B. JEFFERSON: Let me see if this analogy works. It may not, but I contract with

a towing company to pick up furniture in Dallas and bring it to my home in Austin and I pay by the hour. And during the route here, there's a horrific accident along I-35 and it shuts down traffic for 24 hours. The trucks, just like those trucks in China are sitting on the highway. Why wouldn't I have to pay, I'd have to pay the tow company because there's no exclusion for accidents or what have you. Why wouldn't that be to me a cost necessarily incurred and duly justified in my arrangement with the tow truck company?

ATTORNEY GLENN LEGGE: Because your analogy being that they're in the midst of delivery, but they're not actively delivering.

CHIEF JUSTICE WALLACE B. JEFFERSON: Yes and so the ship is, you know, the ship is there to repair, but this storm happens and there is a delay, and part of the cost, it increases the cost of repair because the ship has to be on standby.

ATTORNEY GLENN LEGGE: Obviously, my first question is did your contract with the delivery company also have a clause that says in the event they are delayed by traffic or weather, you're not responsible for that time or that time period?

CHIEF JUSTICE WALLACE B. JEFFERSON: No, it's just, it's a one, under your contract, it's a 1A situation under the basis of recovery. Items repaired or replaced includes all other costs necessarily incurred and duly justified in repair or replacement.

ATTORNEY GLENN LEGGE: In that case, your delivery, if they were, did they leave the road? And that's the situation. I'm not trying to be cute.

CHIEF JUSTICE WALLACE B. JEFFERSON: No, stuck on the highway.

ATTORNEY GLENN LEGGE: Okay. That's what I'm trying to, I'm not trying to be parsing words with you, Justice Jefferson. If they said we've got to take the truck back, it's got to go back to the garage or wherever the truck goes; it's getting off the highway, it's not actively involved in the delivery anymore. I am out of my scope because I'm not actively involved in the delivery. I'm not even involved in a course of delivery over days. I am removing the vehicle from the process because I can't do it anymore. Then, no, you wouldn't be responsible for the mileage or the time. I had a simpler, not as good analogy of I think a company car, then I'm responsible for mileage. I agree, absolutely, simple contract. But it's sitting in my parking lot, I mean in my driveway. It's not being used or I'm not using it for company purposes. I'm using it for my own personal purposes. At some point in time this Court has to say as did the Court of Appeals, this is the scope of coverage that is framed by the terms and conditions that the parties agreed to. And in the Gibson Turner case, why I wanted to address that was it's clearly not dicta in the Gibson case. The Gibson case had a proportionate reduction clause in an oil and gas lease that was lined through. Still in it, still legible, but it was lined through. The Court said there were, they considered three components of the lease in determining the intents of the parties. And, really, that's what we're here for is for the Court to see if it can determine the intent of the parties based upon the facts that are before it. And in Gibson, it looked at three issues, three parts of the contract. And one of them was that it was the part that was struck through as an indication of what the parties intended. Westchester Insurance is a fascinating case. Actually, it has not been mentioned by THEC, but was brought up by us. Westchester Insurance, and I want to put it in the context of an insurance case in case there's any elements of insurance presumptions that may be intriguing this Court. Westchester Insurance has a liability policy. The issue in that case was were defense costs included in a definition of a loss? And what the Court in determining that looked at that policy. The policy had a definition of, original definition of defense costs, which specifically said, excuse me. The policy had an original definition of a loss, which specifically stated that defense costs were included in that definition of loss, defense costs. Subsequent in the policy, there's a deletion that says we fully delete the original definition of loss and there was a subsequent definition of loss later on in the policy, which does not include or reference defense costs. And the Court of Appeals looked at that. The First Court of Appeals looked at that and said we don't, it's difficult to determine in the subsequent definition of loss whether defense costs were included in that.

JUSTICE EVA M. GUZMAN: But there they were comparing two different policies in Westchester, correct? Not crossed-out language within the same document?

ATTORNEY GLENN LEGGE: No, they were in the same document. They were looking at the impact between two policies; one would drop down. But the terms are in the same policy of insurance.

JUSTICE EVA M. GUZMAN: Two different portions; one with strikes.

ATTORNEY GLENN LEGGE: Well it wasn't strucken out, stricken out, excuse me. But it did, the original loss clause was clearly deleted by the policy and a subsequent loss clause put in. The Court looked at the deleted loss clause and said because the parties clearly stated in that definition of loss that attorney's or defense fees were included and they did not include it in the subsequent effective definition of loss, we can look at that deleted language to discern the intent of the parties. There's nothing wrong with that. Exxon Mobil v. Valence, a maintenance of interest clause stricken out, X'd out, still legible. The Court of Appeals, 14th I believe it was, I'm sorry, looked at that as one of the terms to determine whether the parties, what they intended to do in the contract. We have, I believe, 10 cases in Texas that have all stand for the fact that Courts can consider terms that have been deleted or stricken in an effort to discern the intent of the parties in other terms of the contract.

JUSTICE NATHAN L. HECHT: But it seems to me it's crucial whether Tysers, well whose agent Tysers was.

ATTORNEY GLENN LEGGE: I agree.

JUSTICE NATHAN L. HECHT: And that issue's still pending. So it doesn't seem to me, I don't see how you can resolve coverage until you know whether Tysers meant to have an inclusion or they didn't.

ATTORNEY GLENN LEGGE: Whether that issue is still pending, that issue was brought up, an agency issue was brought up by THEC in the Court of Appeals. It was not part of the order. Agency was not an issue that was part of the interlocutory appeal.

JUSTICE NATHAN L. HECHT: But it is an issue in the Trial Court.

ATTORNEY GLENN LEGGE: It was never, it was discussed in the Trial Court, but it was not one of the issues that came up. You're absolutely right. I'm not trying to dodge that question. But to be fair, both parties, knowing that this was an unambiguous contact, both parties in their briefing to this Court included put a bunch of citations to the record on that Tysers testimony. And they are citing emails from Tysers during the dispute saying sure it's covered. And they were citing testimony the Tysers guy who wrote the emails saying I was doing my job as an advocate, a broker, but, yeah, we struck it out; I was working for OSFI. So and I'm not trying to cloud that, but to be fair because I think both sides are concerned about what the Court would look at. Both sides brought in extrinsic testimony to that effect. I am out of time and sorry if I didn't get to all the issues that the Court had questions on.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel.

ATTORNEY GLENN LEGGE: Thank you.

REBUTTAL ARGUMENT OF S. SHAWN STEPHENS ON BEHALF OF RESPONDENT

ATTORNEY S. SHAWN STEPHENS: May it please the Court, Justice Hecht, I think the issue here is not whether Tysers, whose agent Tysers was. It doesn't matter in this situation. For example, under your decision in the Lindsey case and under Justice Green's decision in the Evanston case, when an underwriter has chosen to

use the words arising out of in an insuring clause, when there is a causal connection between the covered peril and the loss, these repair damages, they're covered unless, as this Court has told us in other insurance cases, there is a specific exclusion written into the policy. Here what we're, what the.

JUSTICE NATHAN L. HECHT: Right, but the reason I'm troubled by it is because those are all formally approved policies and here we have a negotiated policy. And if the insured says take this out because I don't want to pay for it and I don't want the coverage, that's one thing. And if it gets taken out because whoever knows why the insurer did it, that's another thing. And it seems to me it's important to know which one it was.

ATTORNEY S. SHAWN STEPHENS: But, Your Honor, again, whether this was negotiated or not, it doesn't matter. They didn't put a written exclusion of coverage in here. We would not be here if they had in at Tysers or Underwriters, whoever did it, written in that two pages of exclusions we don't cover standby claims. Instead, they're making us look to language that was stricken from the policy and then make an inference based upon that striking that it was intended to be out. It could have been because it duplicated coverage.

JUSTICE NATHAN L. HECHT: I don't disagree with you about that, but if the testimony were this, if Tysers testified unequivocally we asked Underwriters to strike that out because the client told us he didn't want that coverage and he didn't want to pay for it, wouldn't that cast this case in a different light?

ATTORNEY S. SHAWN STEPHENS: I don't think it would because we still have those overlapping coverages that the Supreme Court talked to us about in the Lanasa case. Removal of one didn't remove the remaining one. If they wanted to remove it, there needed to be a specific statement that they were doing so. Now all the cases that Underwriters have brought to you today about looking to deleted language or looking to strikeouts, all are distinguishable on their facts and we don't have time to go into all of those right now. But I would like to tell the Court that none of those cases that they talked about are insurance cases. Where there is an intent to exclude insurance coverage, it must be expressed in clear and unambiguous language. We don't have that here. If there is any ambiguity, although we don't believe there is, this policy has to be construed in favor of the insured. And as a result, we ask this Court to reverse the decision of the court below and render a decision in favor of the Houston Exploration Company.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Ms. Stevens. The cause is submitted and the Court will take another brief recess.

MARSHALL: All rise.

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