ORAL ARGUMENT - 1/18/95
94-0781
STATE FARM V. GANDY

LAWYER: May it please the court. When one looks at the record in this case, I believe that anyone would conclude that the covenant and assignment rules as they presently exist and are being applied in the courts in this state, particularly as applied in this case need restatement and revision. One finds that this is not a case of an insurance company refusing to act for its insured. It is a case where the insurance company did more than it had to. State Farm offered to pay the fees of its insured's personally selected counsel. We know that State Farm had no obligation to defend as found by the trial court, and that they had no duty to indemnify for the horrible acts committed by Ted Pierce on Julie Gandy. But it is though through this insurance system this covenant of fiction that State Farm is being told and the insurance companies in this state are being told you must pay for harm where we know there is none. You must pay for the damages and stigma of a crime that you did not commit. And those who are most guilty, the attorney who committed the malpractice and most importantly the molester who is convicted of a crime, who pled to a crime of molestation goes free without paying one red cent.

Texas justice we believe promises more than this. Due process we believe requires more than this. The case presents two issues: legal sufficiency as to damages; and the liability findings legal sufficiency on DTPA and negligence.

This court of course issued Garcia I in which it found that covenants not to execute did not eliminate damages. That case has been vacated. It came out the day before the CA's opinion in our case was issued. But the court did not know of it. We filed a motion for rehearing which raised this issue to the court's attention, but the court in its 2nd opinion in our case found that it still felt somehow compelled to follow Garcia I. We believe that Garcia I does not control this case and should not be the law in this state. We also believe though and it is very important from the outset to understand that even assuming that Garcia I applies in this case, as a general principle when we look at the facts it does not apply from a legal standpoint. And that is for 2 reasons: there is no coverage in this case; and it is not a Stowers case. Every case that has applied the covenant fiction has been a case where those two principles, where those two facts were established: coverage and a Stowers situation. That's the narrow public policy exception to what has been the general rule in this state for literally hundreds of years. And that is that a covenant not to execute is at law the legal equivalent of a release. There is language in one of the cases cited by the court in Garcia I that is just simply incorrect. It cites an out of state case for the principle that a covenant is not a release. We know from the Texas authority Panhandle v. Wilson as restated in the Mercer v. Woods case, that a covenant to avoid circuity of action is treated as the legal equivalent of a release and is discharged.

Now in Texas we have recognized a limited exception in some instances. Some courts have suggested that there is an exception based on public policy where there is coverage and the insurance company has refused to defend or refused to settle the case.

CORNYN: Even where there is no coverage frequently insurance companies until they determine that there is no coverage will defend under a reservation of rights. And so are you advocating a rule that would exonerate an insurance company from any liability for acts committed during the course of a defense of a case under a reservation of rights when there ultimately is determined to be no coverage?

LAWYER: No your honor that's not the instance in this case though. And certainly we don't have to even get to that position. Because in this case State Farm merely offered to pay fees. It did not get itself involved in actually doing the defense. We were like the good samaritan who extended our hand

to try to help and we were told basically just bug off, go away. In fact in the words of Mr. Andrews, the attorney for Mr. Pierce, he treated our offer to pay fees as just simply something to throw in the waste basket. And so that's where our offer went.

Garcia I focuses on the public policy of taking an insured who has coverage looking out after the interest of that insured. That's where the public policy behind even the states that have recognize it flows. And in this case where there is no coverage, there is no need for deterrence of an insurance company. There is no need for a hammer to force them to look out after the interest of the insured because they simply...the insured has no interest where there is no coverage. And also we look at the Stowers setting as being the one we look at the Iowa law as one of the examples of the court that has recognized this principle. Stowers is the narrow area where this rule has been recognized. It has not been expanded into other areas. This is not a Stowers case.

CORNYN: I understand you to say in response to my question that is not this case, you don't need to get there. But assuming we make some statement in that regard, would you contend that the insurance company has no obligation to a person who it chooses to defend under reservation of rights until it determines whether in fact coverage does not exist?

LAWYER: Well if for example legal malpractice was committed by the defense lawyer in the course...and it was a defense lawyer selected by the insurance company so that under Ranger v. Guinn we would have the argument the insurance company could be held responsible. In that setting certainly that would be the case even though there was no coverage. Because the mere fact that at the very least there was in fact an assumption of responsibility. Again in this case the assumption was to offer to pay fees, which was rejected.

Now the public policy issue that comes in in this case we want to make clear and we tried to do that in the recent reply brief that we filed. There is a question about terminology. Simply this: we begin with the principle that a covenant is a discharge. It is the respondents in this case who have to urge a public policy exception to that rule to avoid the fact that the covenant negates damages. And in this case we believe that that public policy balance falls heavily in favor of giving the covenant its full effect in discharging the damages in this case.

The particular public policy issues I think we'll find after review mirror very much the public policy concerns expressed in Elbore(?), reflected in the Beach v. Jenkins case and several other cases in which this court we believe has begun a trend to try to bring some reason to the deal cutting that _____ in this state that is reflected in the numerous decisions involving Mary Carter agreements, involving suits between co-defendants. This type of machination is being discouraged by this court. And we believe that this case and this particular part of the law in Texas is the next logical step to bring reason and integrity to our judicial system.

First public policy question, that is a concern in this case: Stowers begins with the principle that compensation is far harm resulting from the judgment. Harm resulting from the judgment, not the judgment itself. The compensation principle requires real harm. The covenant fiction would violate that public policy, second policy. This in effect by arguing that the judgment is funded by the bad faith case would result in a violation of the prohibition both from a common law standpoint and from a statutory standpoint direct actions. Because we know that they are achieving indirectly what you can't achieve directly. And I think if the court will look at the Beech v. Jenkins line of cases, that is the approach that has ultimately been taken. For example in the Security v. INA case, where they tried to extend it to a Stowers assignment.

CORNYN: Even if we were to agree with you that the covenant negates damages under the

terms of the underlying judgment, the CA here held that there was evidence of damage to Pierce's reputation, credit and ability to conduct his business, and that was an alternative basis upon which its judgment was rendered. What is your response to that contention?

LAWYER: Well we are very happy to respond to that, although we have been accused from hiding from it. Frankly, the only people that ought to hide from this frankly are the criminals who are trying to get benefit from this rule. Because what we have is is State Farm is not only being held responsible for something with respect to which it had no coverage, it had no duty to defend, but now because of this opinion is paying for the stigma that a criminal suffered.

CORNYN: That wasn't my question. My question was assuming you are right and that a covenant negates any harm in terms of the damage of the underlying judgment, here the CA held that there was an alternative basis for the judgment, and that is the evidence of damage to Pierce's reputation, credit and ability to conduct his business. Why doesn't that support the CA's judgment even if you are right on the covenant?

LAWYER: What the court has to look to is what the CA used as evidence to reach that conclusion. And the evidence that they directed us to was the evidence of stigma in terms of Mr. Pierce and his reputation and his ability to do business being damaged by the fact that he had this molestation charge against him. I mean if the court looks at the testimony that was recited in the CA, and it's in the briefs, it is solely directed to those criminal problems. He had to register with local authorities; he had to register with the FBI for being a sex offender. Now that's not something that State Farm caused. There is nothing that State Farm did which can even be remotely tied to that from a causation standpoint. It's just simply something Ted Pierce did to himself when he committed these crimes. And that goes to the other...it blends into the other issue, because when we step back to public policy if the court will direct its attention to No. 6 on this public policy argument is that the most guilty parties go free under this system. Ted Pierce committed a crime. And in the recent decision of Sacks v. Saltell Good, the court stated the basic policy is that an individual who has committed illegal acts should not be permitted to profit financially or otherwise be indemnified from their crimes. They noted a Dallas case Peeler v. Hughes which stated that punishment for crime is intended to be personal and absolute, and to accomplish the prevention of crime, which is the purpose of punishment it is quite necessary that the person should not even entertain the hope of indemnity with the offense committed.

OWEN: The CA's opinion indicates that Pierce testified he could have won the civil suit. I think there is a preservation of error point from that. What was there in the trial court if anything to preserve any objection to that testimony, or any error admitting that kind of testimony? Was there any objection at the trial court by State Farm?

LAWYER: Well there was no objection to his response. And it probably should have been objection to in terms of nonresponsiveness. But frankly that was part of the point we were making to the jury is the absurdity of a party coming in and taking two positions. Because Ms. Gandy is in the position of saying he did it. But yet in the trial court through her attorneys and through this assignment mechanism she is taking the position in front of the jury that she's entitled to recover because of the fact that Ted didn't do it, and because he could have won the trial. Their own expert for example Mr. McMann testified that he wasn't going to win the trial, that he had almost no hope of doing that. And in fact Mr. Pierce himself under Anderson v. Snyder a decision of this court, a lay witness is not capable of giving what is in effect a legal opinion.

OWEN: But is there any preservation of error of that point in the trial court?

LAWYER: There was no objection to that testimony. But there doesn't have to be your honor

because under Anderson v. Snyder the court said that that type of conclusory statement coming from someone who is not qualified to testify as a lawyer is no evidence.

CORNYN: That was a summary judgment case counsel.

LAWYER: That is correct. And also under the case law of this state says that...

CORNYN: The rules are different in summary judgment cases.

LAWYER: No, your honor they are not in terms...because you are looking at legal sufficiency...

CORNYN: Conclusory statements will not support a summary judgment will they?

LAWYER: Because they are not evidence. And you don't have to object to them to be able to review it. And that was the principle in Anderson.

CORNYN: But you are saying the rules are the same in a jury trial, that a conclusory statement by a witness is no evidence absent an objection?

LAWYER: That is correct your honor. And in fact that was recently held in Merrildowl v. Havner by the Houston CA where a plaintiff's expert was allowed to testify extensively that bendectine(?) caused birth defects. And the court held that even though it came in it was a question of legal sufficiency. And those statements were not evidence of probative value. And the court looked at it after the fact not requiring an objection to the testimony. And again what Ted Pierce said does it have probative value? No. And in fact it is completely contradicted as a matter of law by the fact that the court found that he was not entitled to indemnity, which required the finding that he in fact did these acts. Also in this case judicial estoppel we believe would bar the plaintiff from taking contradictory positions in this case.

Going back to the public policy if I may briefly conclude in answering your question. There is a rule of disciplinary conduct that says that we will not permit a lawyer to come into court knowing that a witness is going to tell an untruth and allow him to take the stand and do it. And if they do it should be withdrawn. That testimony has not been withdrawn in this case.

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RESPONDENT

ADAMS: May it please the court. I am Carl Adams from Dallas, and I am proud to represent Julie Gandy here today, the plaintiff in the trial court and the prevailing party in the court of appeals. I will present argument on three areas. The first is the area of what I am going to say is a claim that State Farm enjoys immunity in this case. The second is that the DTPA should and does cover the kind of confusion that State Farm created for Mr. Pierce in this case. And lastly that State Farm is attempting to argue to you a point of voidness for public policy reasons that while it raised in the trial court it did not brief and it did not have a point of error on in any stage of the CA's briefing, or in its application to this court.

ENOCH: Mr. Adams let's...I understand the order you want to do it in. I am interested in the confusion part of this. What is it that State Farm did that it should not have done, or what did it fail to do that it should have done to avoid confusion?

ADAMS: The evidence showed that there were three letters sent to Mr. Pierce and some oral conversations to Mr. Pierce wherein State Farm represented to Pierce that State Farm would defend him.

When those letters got to trial State Farm's own testimony was we never intended to defend Pierce. We intended to set up a defense, an independent defense, where Pierce would defend himself, and he would be in plenary control of the executive powers over his defense.

ENOCH: There are three letters. Now Mr. Pierce said that he had no conversations with his attorney, Mr. Andrews about State Farm paying his fees. He had no...I am little bit curious how these three letters created confusion for Mr. Pierce. Was he expecting State Farm to have a lawyer contact him, or was he expecting a lawyer to kind of show up in the courtroom at some point?

ADAMS: Well Pierce is not exactly clear in his testimony of what his anticipations were. But Pierce says he understood that State Farm was going to undertake to defend him. And when he found out that they were merely going to pay Andrews' fees he was upset by that, and attempted to call them to tell them Andrews was not the guy to defend the case; was a criminal lawyer and could not in his opinion perform. And ultimately he proved to be right. That's what the testimony is.

ENOCH: So the entire evidence of confusion is the letters from State Farm saying that they agree to defend him under reservation of rights?

ADAMS: In principle yes, that's the main part of it. The oral conversations that they told Pierce they would defend him. See what it comes down to is the letters and the representations are: Mr. Pierce, We, State Farm, will defend you. Pierce understood from that that State Farm was making all the calls about who the lawyer would be, and how the lawyer would send bills and that they would control the defense. In his attempts to contact State Farm to inform them that this was not going well, that the lawyer wasn't returning his calls, he testified he couldn't get any relief. At time of trial they come in and say: These letters didn't mean that Mr. Pierce. These letters meant you were defending yourself. And I would argue to this court that it's no small thing the determination of who is in the executive control of the case. Mr. Pierce believed and believed honestly that he was not in control of the case, and that's all the reason why he was calling State Farm to get some help.

ENOCH: What in the record demonstrates any conversations Mr. Andrews had with the insurance company about who was going to defend Mr. Pierce?

ADAMS: Mr. Andrews never contacted the insurance company and never acted on any of the letters that we have been able to see to accept the defense or to act as their agent.

ENOCH: What in the record demonstrates how State Farm found out about Mr. Andrews? If Mr. Andrews had no contact with State Farm, how did State Farm have contact with Mr. Andrews?

ADAMS: The representative for State Farm the investigator conducted an investigation and a statement from Mr. Pierce in Mr. Andrews' office back before it made the determination to provide a defense. So they knew full well who Mr. Andrews was.

ENOCH: So Mr. Pierce told State Farm that he had hired Mr. Andrews to represent him in the criminal charges?

ADAMS: Well they had the meeting in Mr. Andrews' office. There is no evidence that he told State Farm that Andrews had been hired or anything else. I think they certainly could have assumed that.

ENOCH: So the issue on the confusion is that State Farm offered to pay the fees of Mr. Andrews in his representation of Mr. Pierce; and Mr. Pierce wanted to make sure that State Farm knew

that he did not want them to be paying Andrews' bills?

ADAMS: Well there is one other point. You asked me about omissions. Part of the evidence that our expert testified about was the thing that was not told to Pierce was first that you are defending yourself, State Farm is not controlling the matter. And secondly, that you can choose any attorney you please. The testimony is that had that disclosure been made that Pierce and Andrews might have had what our expert called a foot race to find a real lawyer to take over the defense of the case. So what you have is the insured is told we will defend you, and then a letter is sent to Andrews saying send us your bills.

OWEN: Did Pierce ever notify the insurance company that he was dissatisfied with the representation he was getting from Andrews?

ADAMS: He testified he made numerous telephone calls back up to State Farms office in an attempt to get someone to rectify his concerns about Andrews' inactivity, and never could get anyone to respond to him other than to say you will have to call Mr. Andrews, or you will have to go back to your adjuster, Ms. Uncle.

CORNYN: Didn't Pierce pick Andrews?

ADAMS: Initially he did back before the investigation...

CORNYN: If he hired Andrews couldn't he fire him and get another lawyer?

ADAMS: Ultimately when he became so frustrated he obviously did that. But Pierce's testimony is that during the time after he got these letters saying we are defending you, he felt like that State Farm was controlling the defense and he had to go back to the horses mouth so to speak to get any permission to do anything. And it was for those many months that that confusion allowed in effect no one to be in control.

OWEN: Again, that's where I have some confusion. What specifically is in the record about what he specifically told State Farm regarding his position that he was inadequately represented by counsel, by Andrews?

ADAMS: Well his testimony again that he called numerous times...

OWEN: And said what?

ADAMS: And said that he couldn't get a hold of Andrews; and that he wanted to know what State Farm was going to do to defend him. And from that I believe the jury believed and the testimony certainly is sufficient for them to have believed that Pierce was confused that State Farm in effect was controlling what he could and couldn't do with reference to Andrews. And the most important point is that Andrews was the only lawyer they were willing to pay the fees on. And Andrews was out to lunch to say the very least. Wasn't returning calls to Pierce, wasn't sending reports or any sort of status inputs to State Farm or anything.

CORNYN: And Andrews represented Mr. Pierce in the criminal case?

ADAMS: For awhile he did. Yes, sir.

OWEN: Did he represent him at the time that he pleaded nolo contendere?

ADAMS: No, I don't think he did.

OWEN: He had other counsel?

ADAMS: I think he had other counsel at that time.

OWEN: Did he give notice to State Farm when he fired Andrews and hired another counsel in the civil case?

ADAMS: No, ma'am. He surely did not. Now turning to the claim that State Farm is immune. If you look at what they say they say the reason they can have no tort liability to Pierce is because they had no coverage. They based that on two cases: Hernandez case, and the Garcia I opinion. Now if you go look at Hernandez it adopts the judgment rule. And the only thing it says about the insurance policy is in the present case, now I quote here: "In the present case the insurance policy is relevant only in that it is the source of Great American's duty to use care in the defense of Hernandez for any judgment for any amount." Therefore, the entire basis for their claim that an insurance company is immune if it has no coverage no matter what wrongs it engages in is based on a misreading of this court's 1971 opinion in Hernandez. Then secondly, it misreads Garcia and says: "Garcia is a Stowers case, or a failure to defend case, and therefore because there is no coverage, the plaintiff loses that case." And it would have this court say that if there is no coverage the plaintiff loses any case. Once again we are immune once you get passed our contractual liabilities we become immune from the DTPA, from any form of other tort liability we might have for any conduct we engaged in.

Now I would ask you this question: Taking that to its most illogical conclusion if Mr. Pierce had gone to State Farm's offices in Dallas to sit down to discuss this defense which probably would have been a good idea at some point, and while on the premises was mauled by the pet lion they kept in their office there, would they then be standing here and saying: well since he had no coverage we as tort feasors have no liability? Now that's an extreme example, but that's exactly my point. This liability flows from what they did and how they did it, and how they confused their insured about who was in charge ultimately leading to the conclusion by the jury that virtually no one was in charge.

HECHT: Wasn't he going to be convicted under almost any set of circumstances and how is it consistent with the finding that they don't have any coverage?

ADAMS: Firstly, Mr. Pierce protested throughout the entire proceeding that he was not guilty of any of these acts, and that it was his frustration with the inability to get State Farm to provide him any answers about how he could defend himself that led to his decision to give up virtually on all of the defenses.

HECHT: But he agreed to a judgment.

ADAMS: He agreed to a judgment, that's correct. The jury heard all about that and I am sure reached its conclusions about how guilty or not guilty he was. My point is, that the causation in this case is Pierce was subjected to making that hard decision, his testimony is, because he couldn't get any relief at all from the insurance company that promised him it was going to give him relief. And so much like a legal malpractice case...

HECHT: What difference does that make if you are still going to lose?

ADAMS: Well Pierce said he was not going to lose.

HECHT: How could he not lose if there was no coverage, which meant that he did it, doesn't

it?

ADAMS: Well no I don't think it means he did it.

HECHT: Then there would have been a coverage?

ADAMS: No, that's not the point. The point is you can harm an insured even when he has no coverage is my point.

HECHT: How can that happen?

ADAMS: Pierce testified that he would prevail in the underlying case. And an expert has testified that at the very least the damages could have been substantially reduced from what they were in the agreed judgment.

HECHT: What difference would that make? Suppose it would only been $3 million instead of $6 million or $1 million?

ADAMS: Well I suppose...that's a fact question for the jury.

HECHT: What is the legal difference, not what could the jury believe about it? But if that's what's going to happen to you what difference does it make that they didn't tell him that he should get another lawyer or that Matthews wasn't doing it right, or whatever?

ADAMS: Well I think it comes down to the question of whether the end result can then be used to justify the wrongdoing that has led to that end result. And what you are stating in the form of the question is, in fact most of their presentation here is, Mr. Pierce is an evil person, he's an abuser, and he deserves no respect or consideration. And yet it was...the jury found their misconduct and their confusion over his right to have counsel, which has always been considered to be a precious right, that led to that very occurrence that's given him that very stigma. Now State Farm made these very arguments factually to the jury that Mr. Pierce was not going to be able to pay a $6 million judgment, and he was not going to be able to pay a $2 million judgment, and so what difference does it make? Well Pierce's testimony was that he would prevail. Pierce also had testimony that he would...if this judgment had not been entered and he hadn't been required to throw in the towel, that he would have had none of the stigma and none of the mental anguish associated with going through months and months of frustration and face these serious charges.

HECHT: How could he avoid the stigma of the criminal proceeding?

ADAMS: Well the same way he could avoid them in the civil case by having competent counsel to defend him. One of the confusions Pierce had...

HECHT: But surely State Farm's not responsible for the counsel in the criminal proceeding?

ADAMS: That is exactly correct. However, Pierce's testimony was somehow or another and I am not exactly sure how Pierce reached this conclusion, but his testimony was that in his initial meetings with his adjuster he got the impression that the defense would be both for the civil case and in the criminal case. And I don't know whether those were discussions about the civil case should go to trial first, or what caused him that confusion. And I agree it's not a logical conclusion, but that's what his testimony was. And so when State Farm refused in his opinion to follow through on their promises to defend him in the civil case he just assumed that life was not worth living and threw in the towel on both cases. Now that may not be

logical, but that's what the testimony of Pierce was.

ENOCH: It seems to me that the law generally stands for the proposition that one party is relieved of their obligations of performing under a contract in anticipation of another's breach only in the circumstance where it is clear that the other party intends not to comply with the contract. In other words you are not required to do a fruitless act. If it's clear that they are not going to do it, then you don't have to do it. Well here we have a case where Mr. Pierce is saying: I thought they were going to defend me. I thought they were going to come forward. I thought they were going to do the following things. You have an insurance company out there that is in contact with the attorney Mr. Pierce chose; offers to pay their fees and in contact with that attorney. The posture of this case comes to us with Mr. Pierce saying well I didn't want them to hire Andrews. I didn't know they would hire somebody else. I didn't know that's what they were planning on doing. Is the actions of State Farm so unequivocal that Mr. Pierce after the fact did not need to alert them that he hired a different counsel in the civil case, and Mr. Pierce after the fact didn't need to let State Farm know that he was going to settle the lawsuit for $6 million, that after the fact he could sue State Farm for having botched the defense of the case. Is State Farm's act so unequivocal that it is clear from the information that Mr. Pierce didn't have anything further to do except sit back and accept an agreed judgment against himself?

ADAMS: I would argue certainly that it is. Our expert testified that the wilfulness of the carrier appointing in these letters Andrews and then 9 months goes by no follow-up check, no follow-up on any of the letters or phone calls to try to figure out what's going on with the defense. Now one of the things that we cannot forget, and I think has been raised is, irrespective of the covenant issue in this case this judgment, whether it is ever paid or not there is direct testimony in this record and the CA has cited the court to it, that Pierce suffered consequential losses separate and apart from mental anguish, and loss of reputation, apart from whether he would ever have to pay the judgment or not.

OWEN: But not apart from the charges he pled nolo contendere to? Is that correct? The damages you just discussed are not separate and apart from the criminal charges he pled nolo contendere to?

ADAMS: No, they certainly are. Yes, he testified to the frustration of the many months of trying to figure out who was going to defend him and what was going to be done in the civil case as well. And of course that's all in addition to the testimony that he said on their questions he said he would have prevailed in the underlying case and it would have made a difference. He would have been the winner. Now that question was asked by State Farm. No objection by State Farm. And now they want this court to say well even though we injected that evidence into the record we want you to disregard it. That's the kind of waiver I don't think they can get past.

OWEN: What was the timing? Was the nolo contendere plea entered before the judgment, the $6 million judgment?

ADAMS: I am not exactly sure. I think they were within a matter of a few weeks of each other. I think the criminal case may have been a little bit prior. But quite frankly I don't recall.

SPECTOR: Are you suggesting that Pierce was worried about paying the judgment when he agreed to a $6 million judgment?

ADAMS: Pierce was worried about defending himself against what he thought to be false allegations in both forms.

SPECTOR: That's not my question. When he just I thought suggested that he wasn't sure

whether he was going to have to pay the judgment or not, and I am wondering if agreed to a $6 million judgment not knowing whether he was going to pay it or not?

ADAMS: Absolutely not. At the time he agreed to the judgment he was aware of the covenant to limit the execution. But it was the prior months that he had suffered without any counsel, without any assistance in anticipation of how he was going to resolve that issue that I was referring to.

Now what it comes down to in a nut shell your honors is State Farm says Mr. Pierce is a silly person, his belief that he...

GONZALEZ: Not silly. He's a convicted child molester. Not silly.

ADAMS: But on the point of liability they have here they say Mr. Pierce was silly to become confused about what we were doing. They had that factual defense in front of the jury, and the jury rejected it. At its highest level, that is a claim that Mr. Pierce was contributorily negligent in how he read or how he construed what they told him and what they didn't tell him. Contributory negligence is not an affirmative defense to the DTPA.

GONZALEZ: What was the substance in the underlying criminal case?

ADAMS: I am not entirely familiar with that. I think it was probation for some term of years, and a fine.

ENOCH: Mr. Adams just one last question. In the exhibits there appears to be like a plaintiff's Ex. 13 which is a June 24, 1991 letter to Ray Andrews from State Farm, which had a first sentence that says: Dear Mr. Andrews, please be advised that State Farm has made the decision to defend Ted Pierce. And then there is a lot of white space. And then at the bottom of the letter it says: If you have any questions with regard to the above please feel free to contact. There appears to be a defendant's Ex. 10, which is the same day, June 24, to Ray Andrews by the same person Pat Armworker, and it starts out with the same letter sentence that says: Please be advised that State Farm has made the decision to defend Ted Pierce under a reservation of rights. And then it goes on in a series of coverage questions that it poses. Where did this Plaintiff's Ex. 13 come from and where does this Plaintiff's Ex. 10, can you explain what this is?

ADAMS: The plaintiff tendered a redacted form of that letter to avoid the entire issue being presented to the jury of reservation of rights and what the legal position of the parties were. Later on in the trial the court just pitched it all in there and said allow them to tell the jury that they were not obligated or they felt they weren't obligated under their policy to indemnify.

ENOCH: You mean the lawyer on behalf of Ms. Gandy wanted to tender a letter that said they had made the decision to defend to Ted Pierce without the issue of under reservation of rights?

ADAMS: When the trial first began we took the position that the jury shouldn't be informed in passing on the tort case about the lack of any coverage. So, yes sir.

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REBUTTAL

LAWYER: May it please the Court. I would ask the court to look at page 23 of the reply brief for petitioners through 25. I think that is real important. The court has heard a number of things regarding what Pierce said, who he talked to at State Farm that are just simply not correct. Ted Pierce could have

called State Farm. State Farm has absolutely no record that he ever did. When cross-examined Ted Pierce said he didn't know when he talked to them. But he said he did know one thing, that he had taken notes, and he destroyed the notes. Now there is a legal presumption under this state that as a matter of law one who has documents in his control pertinent to an issue and destroys them, the presumption is that those documents would have been to the contrary of the position that he took.

Also in this case in terms of what happened. I think it is important for the court to see the evolution of this theory. Because Ted Pierce when this case started out he hired Andrews. He knew that he had a drinking problem. But he was one of his cronies. He used him on the criminal case. Had him hired on the divorce case. He knew what he could do. He knew that he was a criminal lawyer. The discovery was screwed up. The ox was in the ditch before State Farm ever offered to defend. They had already screwed up the discovery back in April. State Farm's first offer of defense comes in June. Ironically enough the day after State Farm sends the letter Mr. Browning with the plaintiff's firm is contacted by one Howard Patterson, attorney number 2 for Pierce, who had an equally checkered background some 15 or more grievances against him. He comes in, he tells him I am probably going to substitute in for Andrews. And they talk about the case. They talk about the discovery screw ups. Pierce is told before the reservations come the discovery is screwed up. But he doesn't do anything. Nothing. He waits until sanctions are imposed in August. He says: Well I couldn't do anything constructive because I couldn't get my file from Mr. Andrews. He hires and fires in this case at will. This is a charade that is being perpetuated on this court to say that Ted Pierce didn't know exactly what he was doing. He even consulted the DA in the county where he lived about the fact that Andrews was screwing the case up. No hesitation. And no, Justice Enoch, he never made any attempt to contact State Farm. State Farm asked for them to report to them if there was anything important. They didn't. They didn't talk to him in September when they started doing a set up deal. They didn't talk to them in October or November as they were effectuating that deal. They didn't even talk to them once the judgment, the set up judgment, agreed judgment which has all sorts of resuscitation of things that happened to make it look...to sanctify it. And in fact they are totally untrue duping the trial judge in that case and making him look bad as well. But, no, we didn't even hear about that. In fact Mr. Holman once we finally get wind that something is going on was State Farm calls up Mr. Patterson and he says: Has there been a judgment entered in this case? And Patterson in his wonderful ennoble style says well: _____ I am not sure, I am not sure where it is, it's ugh, ugh, I can't find my file. I don't know. Lied. He lied about it.

The theory from day one according to everyone Ted Pierce said there was a denial of defense. A denial of coverage. And if this court will take a look at the _____ to execute and the assignment. What that assignment says is there was a denial and a refusal to defend. Not mismanagement defense. Nothing with the problem with D. Andrews, no indication of confusion about Ted Pierce. But in fact there was a denial. Ted Pierce according to Howard Patterson testified that he had been told that there was a denial letter. So the whole set up is done based upon the presumption that State Farm just flat denied. Well what happens. There is a letter sent in the record to Howard Patterson once we find out about the judgment from our law firm. And we tell them what is going on? Here are two letters attached where we have offered to defend. Offered to defend. And you are saying we refused. All of a sudden a letter comes out from the plaintiff's office. And it is asking where is this letter of denial; even attaches an affidavit asking for Pierce to put under oath what really happened. And never signs it. Because what they are telling this court happened is not what happened. No harm, no foul, and the criminal goes free.