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96-1201
STATE FARM V. TRAVER

LAWYER: I represent State Farm Mutual Auto Ins. Co., the petitioner. This is a summary judgment case and presents the issue, which is a matter of first impression for this court, regarding whether an excess judgment can be recovered from an insurance carrier based solely on legal malpractice of the attorney appointed by the insurance carrier to defend the insure, and in absence of a valid Stowers claim.

The facts are somewhat unusual in that State Farm actually insured two separate parties: Mrs. Davidson was one of its insureds; Mr. Klaus was another insured, both elderly people who had a head-on collision up in Denton. Mary Jordan who was the plaintiff in the underlying suit was a passenger in Mr. Klaus's car. Mary Jordan sued Mr. Klaus, and Mrs. Davidson, and State Farm hired separate counsel to defend both of its insureds.

Mary Jordan was seriously injured. Her medical expenses exceeded $50,000. However, State Farm's limits for Mrs. Davidson were $25,000 of the liability limits and $25,000 for Mr. Klaus.

ENOCH: Do you agree that State Farm had a duty to defend Mrs. Davidson?

LAWYER: Absolutely.

ENOCH: What could constitute a breach of that duty to defend? You could have a refusal to defend when you have an obligation to do so. What happens if the defense is itself negligent?

LAWYER: If the defense itself is negligent, I think the issue would be in what respect? If it was the attorney employed by the insurance company who was negligent, then that I believe is the issue in this case. Would that constitute a failure to defend? Would the insurance company be liable for the attorney's negligence? It would depend if it's a matter of direct negligence in some respect by the insurer through some decision it made or some conduct it took.

ENOCH: Or could the insurance company be responsible for negligent hiring of the attorney?

LAWYER: Yes your honor.

ENOCH: Would the liability of the insurance company be dependent on a Stower's sort of obligation, or would it be dependent on simply exercising its right to defend?

LAWYER: Well I believe it could have both obligations depending on the...well it has both obligations. It has the duty to defend. The duty has 3 obligations: the duty to indemnify; and then the third obligation that was recognized in the Stower's case, the duty to exercise reasonable care in settling a case within policy limits.

ENOCH: But this case is not...there is no allegation in this case, no claim in this case, that the insurance company was negligent in hiring of the lawyer, the only claim is that the lawyer's handling of the trial of the case was negligent; and the insurance company through principles of respondeat superior should be liable, that's the only issue that's here?

LAWYER: That is correct. There was no allegation in this suit after the judgment in the underlying suit, that Charles Bradshaw, the attorney appointed to represent Mrs. Davidson, had been incompetent when he was hired, or that the insurance company was negligent in that respect.

CORNYN: You concede don't you that the status of an insurance defense lawyer is unique in terms of the relationship the lawyer has with the person that he or she is representing?

LAWYER: Yes.

CORNYN: There are some strings attached because the insurance companies like to of course pay as little as they can to provide a lawyer to their insureds because they being volume litigators, the cost of the defense is an important determinant in their overall success. Would you agree with that?

LAWYER: I agree with that.

CORNYN: And so they put limitations don't they on what lawyers can actually do in terms of discovery that can be conducted or an investigation that can take place. What if an insurance company said: Lawyer we're going to hire you to represent Mrs. X, but you can't do any discovery. It's not an economical thing for us and you just go in and you try the case and then there is an excess judgment. The insurance company tenders policy limits so there can be no Stower's claim. But is Mrs. X without any kind of remedy?

LAWYER: No. I don't believe she's without a remedy. And I think in that situation and were those facts alleged they would state a claim of negligence directly by the insurance company which would be the distinction between that case and this case where there were no such allegations, but only allegations of negligence by the attorney.

PHILLIPS: By the time the case gets up to here at any rate, there is a suggestion that the insurance company had decided to have one claimant prevail the other among its plaintiffs that had State Farm policies. And that this attorney was acting under direction. Isn't that a direct claim against the insurance company?

LAWYER: The allegation was that the insurance company had a motive to do something, a motive to not throw any liability over onto the co-defendant, because...

GONZALEZ: Because they want to cut their losses; pay as little as they could..

LAWYER: No. Because they fear, a perceived fear of Stower's liability for failure to settle the claim against Mr. Klaus within policy limits, which fear was unfounded, never existed. And that's the suggestion that it had a motive. But the allegations are that the lawyer was negligent and...

PHILLIPS: A case could be made out that alleges that an insurance company tells a lawyer to do less than its best or try to lose this case, etc., that would be a cognizable claim?

LAWYER: That would be a different case.

PHILLIPS: How about negligent entrustment: hiring an attorney that is demonstrably unfit to handle a case?

LAWYER: Hiring incompetent counsel would be a direct claim for negligence against the insurance company. And that is not this case.

CORNYN: You could not assert a claim against both the lawyer for his or her negligence and respondeat superior liability against the insurance company, and seek to satisfy whatever the damages are from either source. Is that an option?

LAWYER: In this situation?

CORNYN: In the situation the CJ posited where the insurance company hires an incompetent lawyer and there is excess judgment. Could the insured have a claim both against the lawyer for the lawyer's negligence, and the insurance company for the insurance company's negligence, and I guess suppose a 3rd claim for vicarious liability of the insurance company for the negligence of its agent, the lawyer, who they hired to represent the insured. Would all 3 of those claims be viable?

LAWYER: I believe the first 2 claims would be viable, the third I would question for the same reason that our position is that the insurer has no liability in this case, and that is whether the attorney is acting as the agent for the insurer. If the insurer simply hires incompetent counsel and the counsel goes out and botches the defense possibly the preliminary question is: Is the attorney acting as the agent for the insurer?

CORNYN: Would that turn on the right of control that typically these hat agency considerations turn on?

LAWYER: Yes, I believe it does. And the right of control whether it would exist where the

insurance company hired incompetent counsel, I would doubt. Where it injects itself is a defense in some way. For example by saying we're not going to allow any expense for discovery, and we don't want you to do any written discovery or this, that or the other. If there is allegations and proof that the insurance company deliberately injected itself into the defense, then once again you come back to direct liability of the insurance company, and possibly a situation like the Tilley case, where the insurer instructed the attorney to go out and get information that it could then use to _____ coverage and it was undisputed in that case that the attorney was acting on behalf of the insurance company. But in the normal situation where the attorney is defending and handling matters of judgment, its professional independent judgment, I think that the better reason cases across the country and this is an issue that this court has not addressed is that the attorney is acting as an independent contractor in the actual defense of the case, because of ethical reasons and the disciplinary rules.

OWEN: Let me ask you about the distinction between contract and tort in these cases. Let's assume that the insurance company did direct the attorney not to take certain depositions, not to do certain things and injected itself in direct control of the defense. Is that a breach of contract? Do you have a tort cause of action for negligence or both?

LAWYER: I believe that that would be a breach of contract because that would be a breach of the duty to defend. And this court has said that the insured does have that remedy - it's contract remedies for breach of the duty to defend. In addition, I believe that there is a footnote in Garcia which talks about the Allstate v. Kelly case where the court said that possibly in that situation where the insurance company tried to pay its policy limits in the court and basically abandoned the insured and also urged the insured not to hire counsel. That type of situation this court said that possibly the insured could have a DTPA action directly against the insurer. I believe it's footnote 11 of the Garcia case.

OWEN: What about negligence? Let's assume that the insurance company directed counsel to not take certain depositions but spending caps directly inserted itself into the defense of a case. What causes of actions setting aside DTPA would you have breach of contract negligence or both?

LAWYER: It would be breach of contract. It would definitely not be negligence because the insurance company's conduct would be deliberate and intentional. And intentional conduct and negligence are not interchangeable. Now negligence is not a lesser and included offense of intentional conduct. Or to put it another way even if someone alleged that it was negligent conduct, I think that intent would have to be inferred where the insurance company made a conscious decision to...

OWEN: Well how is that different from the lawyer's decision? The lawyer decides I don't think it's necessary to take these depositions. The insurance company may decide I don't think its necessary to take these depositions. Why is one negligence and the other an intentional tort?

LAWYER: Well the lawyer is exercising his independent judgment as an attorney presumably on behalf if it's the attorney representing the insured, he is presumably acting in the best interest of the insured. If he's instructed by the insurance company to not take certain action, then he would be acting on behalf of the insurance company. If there are allegations and proof that the insurance company instructed him not to take certain depositions, then that would present a case of deliberate conduct on the part of the attorney.

OWEN: So would it be a tort cause of action or just a contract cause of action?

LAWYER: Against the attorney?

OWEN: Against the insurance company?

LAWYER: I believe that it would still be a breach of contract.

ENOCH: Could it be a tortuous interference claim between the attorney and the insured?

LAWYER: That's a possibility. I wouldn't commit to that. I had not considered that before. But there might be other remedies beside. But it would not be negligence.

CORNYN: Why wouldn't it be negligence though because wouldn't the insured be entitled to recover even the amount of the judgment in excess of the policy limits if that's the damages that they suffered as a result of the wrongful conduct of the insurance company? In other words, you're not suggesting that the insured could only seek recovery up to the policy limits are you if the insurance company wrongfully interjected itself into the defense of the case?

LAWYER: I believe that would depend on the damages. Here one of the problems is that the full amount of the excess judgment, the Stowers' remedy, which has never been applied in any case other than a negligent failure to settle, is being asked for by the insured or for the real party. I believe that in Gandy this court discusses the possibility of what measure of damages would apply for mishandling of the case by the insurer, and suggested that the measure would be the difference between the judgment that is rendered and the judgment which should have been rendered, which would not necessarily be the full amount of the excess judgment.

CORNYN: But it would be certainly more than the policy limits, or could be?

LAWYER: I would not go so far as to say that because there is no such case that has ever allowed recovery in excess of the policy limits.

CORNYN: The insured would not suffer any damages at all if it was within the policy limits; correct? So the only circumstance where you would have damage to the insured if there would be a judgment in excess of policy limits? You told Justice Owen that you thought this was a contract

action only, but under what contractual theory could you ever recover more than just the policy limits against the insurance company?

LAWYER: For statutory violations?

CORNYN: For wrongfully exercising control over the insurance, the defense lawyer to the harm of the insured?

LAWYER: I think that there might be independent damages suffered such as mental anguish...

CORNYN: Which wouldn't be recovered under a contract theory?

LAWYER: Would not be recoverable under contract theory but might be recoverable under the DTPA or insurance code violations.

PHILLIPS: You say this is a case of first impression and hoping it may be. But we've discussed this area in Ranger Insurance and in APIE and Garcia. Would you just briefly comment on the court's prior discussions because I think we are going to hear some more about this issue.

LAWYER: The issue of whether the attorney is acting as agent or subagent was discussed in Ranger. However the court said there that the attorney was acting as a subagent for the insured which begs the question or certainly doesn't answer the question of whether the attorney is agent for the insurer. Additionally in Ranger as this court pointed out in Garcia the only issue was the Stowers' breach of duty to settle and therefore, the comments in Ranger regarding the expansion of the Stowers duty to include all aspects of the agency relationship including investigation, preparation for trial and trial are dicta.

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RESPONDENT

LAWYER: All three of those claims are viable claims and all three have been asserted throughout this jurisdiction now. Those three claims that would exist in this case based on the law are: negligent hiring of an incompetent lawyer; a direct cause of action against the insurer for whatever that insurer might have done directly by its own conduct; and third vicarious liability. That situation that you described Justice Owen is a tort. And the reason it is a tort is set out in Gwinn. And Gwinn unquestionably said that the duty an insurance carrier has extends to the investigation, preparation of defense, and defense at trial of its insured. Those duties that were enunciated by this court extend beyond and are in addition to the duty to settle that is involved in a Stowers' case.

OWEN: But are those contractual duties or tort duties?

LAWYER: They are tort duties.

OWEN: Why are they separate and apart from the contract?

LAWYER: Because the contract says you have to come in and defend the insured and you have to pay a judgment. In this case is a perfect example of why a tort does exist under Gwynn under Carter, under Canal, and should continue to exist. In this case there was a judgment rendered against Mrs. Davidson for some $475,000. It is my position and I believe that I can show at trial that State Farm purposefully told that lawyer not to do certain things at trial for one reason only. That reason was they had put themselves in a Stowers' position as respects their other insured Klaus.

ENOCH: Was that the posture of the case when it came up on appeal?

LAWYER: Absolutely it was.

ENOCH: Then how come that's not in your pleadings?

LAWYER: It is in my pleadings. Specifically I allege that State Farm took that action because of its wrongful motive to do it. The motive did not exist for attorney Bradshaw.

ENOCH: Your suit against State Farm alleges that they interfered with the work of the lawyer.

LAWYER: It's not interfered. I take the position that they directed him because he was working for them. They had the right to control him. They told him what to do. He did it for them because they paid him.

ENOCH: Do you have a cite in the record for that?

LAWYER: As to the pleadings?

ENOCH: Yes. Where about in the pleadings?

LAWYER: I will get it for you.

ENOCH: The allegation at least by the CA is an allegation that the attorney committed negligence in this case. And because the attorney committed negligence then, therefore, State Farm is liable?

LAWYER: The CA's opinion discusses expressly vicarious liability. The point that I'm trying to make is that the case in the TC as pled; and keep in mind Judge this was a summary judgment case. I had no chance to develop any evidence. State Farm filed a motion for summary judgment immediately. It was granted on all grounds. There was no chance to develop any evidence other than responding to the summary judgment. The point that I am trying to make is the claim that I

made throughout my pleadings was that State Farm's actions originated at State Farm. And they're the party that had motive to not have the lawyer show up for the deposition of the only fact witness in the case, not show up for the doctor, and I believe that because the insurance company paid this lawyer, he did what they told him to do.

OWEN: Well just because you have a motive does that confer to breach of contract case into a tort case?

LAWYER: No. But the Gwinn case and the Canal case and the Carter case established that it is a tort.

PHILLIPS: The Canal case is a 4 judge opinion that you're relying on as opposed to a majority the court would write?

LAWYER: It is. However, it is my reading of that case particulary in the concurrence, that in recognizing the equitable right to subrogation, they recognized and expressly state there, the law laid down in Gwinn.

HECHT: In a Stowers' situation?

LAWYER: Not necessarily.

HECHT: Gwinn was a Stowers situation?

LAWYER: Well yes and no. The Gwinn case involved a settlement situation. But the way I read that opinion, this court went to great links to state that independent of the duty to settle in a Stowers situation, there is a duty to improperly investigate, properly prepare for and properly defend a case. If that weren't the case, an insurance company could skate for nothing. They could say well we are going to make like we've hired a competent counsel, and we don't have any liability; we can tell him not to show up for any depositions; we can do anything.

ENOCH: That's not necessarily the case. If they take on the duty, Mrs. Gardner as I understand essentially agrees, or accepts the notion that if the insurance company takes on a duty to defend, then it takes on the duty to hire competent counsel. It seems to me that your motive issue that it may not go to a competent counsel, but it may go to the insurance company's interfering with the relationship of the insured to the lawyer. Now it seems to me that sounds like a tortuous interference claim; and why wouldn't the insurance company be liable for interfering in the relationship of the lawyer to the insured?

LAWYER: I agree, the motive does not go to hiring an incompetent counsel. I am struggling with the interference with contract.

ENOCH: And that is a cause of action recognized in Texas; right?

LAWYER: No question about it. The reason I'm struggling with it judge is that we've got an insured who has an _____ contractual relationship with its carrier. There is truly a separate contract between the insured and the lawyer. But the point I'm trying to make is the motive and the actions that I think I will develop at trial will show a direct involvement of the carrier in directing the attorney's actions.

OWEN: But the duty of the carrier stems from a contractual document; that's the whole root of the duty is it not on the duty to defend?

LAWYER: No question about that the policy directs the contractual relationship between the insured and the insurer. The point that I am trying to make is the way I read Gwinn is that relationship creates an independent tort...

OWEN: Why aren't your damages the same? Assuming that you can prove the insurance company directed the attorney not to do certain things the attorney should have done to properly defend, and you can establish that, what difference does it make to you whether the cause of action sounds in tort or contract?

LAWYER: Because under contract the only damages that is has would be whatever the policy limits are.

OWEN: Why is that? If your duty to defend, which is separate and apart from the duty to indemnify, if you have a duty to defend and you don't discharge that and your insured has a judgment against it for an excess of the policy limits, why are you limited to the policy limits in a breach of contract action?

LAWYER: Well because the way I would interpret the insurance policy, and I'm sure the carrier would assert, that by tendering its limits and providing a lawyer, they've completely satisfied their contractual duty.

OWEN: But if they breached their contractual duty in providing the defense, what's the limit on the damages for the breach of that duty?

LAWYER: I would assume in a breach of contract whatever you can show was reasonably related to that breach as you have characterized it.

OWEN: And how is that different from a tort cause of action?

LAWYER: Because I think and the tort extends beyond the contractual duties.

OWEN: How are the damages different?

LAWYER: The insured may have to pay out an excess judgment. It may have mental anguish. It may have its own attorney's fees to hire another lawyer to attack the excess judgment. They may have to go hire an independent counsel to defend that case. And I think that that would be as a result of an independent tort, that was committed by the carrier in the way it conducted the defense.

OWEN: Which of those damages could you not recover under a breach of contract cause of action for breach of duty to defend?

LAWYER: As I understand State Farm's position, all of those could not be recovered.

OWEN: What's your position?

LAWYER: My position as far as contractual damages for the breach of the duty to defend, that's the question?

OWEN: Yes.

LAWYER: As I think through it perhaps a breach of contract with a breach of duty to defend assuming that includes investigate, prepare for trial, and at trial it would likely be the same. As long as they flow from that contract. As I think through it.

HECHT: You wouldn't seek punitive damages?

LAWYER: Well obviously if you've got a breach of contract case you are not going to be able to seek punitive damages.

CORNYN: You can't get mental anguish damages?

LAWYER: Obviously not.

HECHT: I'm not clear about the parameters. If there was no interference by the insurance code, and if counsel was experienced insurance defense counsel, so that any claim of negligent entrustment would be pretty weak, but the lawyer did screw up, did mishandle the case, would the insurer have liability?

LAWYER: Yes. Under the laws that exist in Texas under Gwinn under Carter and under Canal yes. Now what State Farm argues to you in its brief is the law should change based on this Merrett decision out of California, which holds as a matter of law there is no vicarious liability. But as the law exists in Texas it's my belief that there is vicarious responsibility and liability.

PHILLIPS: Did you sue the attorney?

LAWYER: Yes. He's been severed and nonsuited. He's no longer part of the suit. Let me come back to your question Judge Owen. As I think through that, I think Justice Cornyn is right. In a breach of contract action you're not going to have mental anguish damages associated with what that conduct might have caused. You also have no punitive damage claim. So I want the record to reflect as I think through that there is a different set of damages that would exist for tort of the breach of failure to investigate, prepare for the defense and defend, as opposed to a breach of contract.

ENOCH: You say that Sate Farm wants the law to change, but isn't the law in Texas very clear that counsel hired by an insurance company to defend an insured owes their lawyer professional duties to the insured, not to the insurance company?

LAWYER: Absolutely that is the law.

ENOCH: So if this court takes the position that vicarious liability is a permissible recovery against the insurance company for the negligence of a lawyer, isn't that inconsistent with our directive that the lawyer owes complete loyalty and duty to the insured, because the insurance company now have a financial risk over the day-to-day conduct of the trial of the case by the lawyer. Isn't that sort of kind of insurance company you are not to be interfering with the lawyer's relationship with a client, but on the other hand you are liable if the lawyer is not consistent with the...I mean if the lawyer _____ judgment and exercise of this lawyers' work is kind of wrong, the insurance company is going to be liable for it. So wouldn't an insurance company take over the active handling of cases?

LAWYER: What you've pointed to is the unique situation that Justice Cornyn raises about the relationship. Let me start by saying this, the law is that there is vicarious liability by a carrier for the actions of his attorney. This court will not be creating any law if that is its decision. That has been this SC's law ever since Gwinn.

PHILLIPS: Not a penny's ever been paid on that ____ in a case that reached us?

LAWYER: I don't know whether a pays been paid or not.

PHILLIPS: The language has been there, but there's all been a more traditional duty than the actual fact?

LAWYER: True. But that doesn't change the fact that that's what the law is, that's what the CA in Carter and that's what this court has affirmed again to be the law. Now to address your situation it is a difficult situation having been there. The Tilley doctrine says without question that the lawyer owes a lawyer/client relationship duties to its insured. There's no question about that. However, since the carrier has hired that lawyer and made that decision and given its insured that

lawyer's word, if he makes a mistake I think vicarious liability should apply. I think Justice Gonzalez might have taken a different view when he wrote the dissent in Gwinn, but it is my judgment that that's what should be the law. It's just a difficult unique situation that lawyers who do insurance defense work have got to deal with. They've been dealing with it for years. I don't think it is inappropriate for this court to continue that situation given the existing status of the law.

ENOCH: There's been no Stowers demand; no demand that would settle within the policy limits. And the insurance company hires competent counsel. What purpose, what is the insurance company's obligation beyond that in terms of being liable for more than what it would be liable for if the insured lost the lawsuit for an amount in excess of the policy limits?

LAWYER: I think it has an obligation to follow through on its responsibilities to its insured to follow that insurance company lawyers activity to make sure that he is in fact satisfying the duties that the carrier has under the liability policy. If the only obligation that carrier had was to hire competent counsel they would go through the book, they would hire a great lawyer on paper, and then watch Ponchas pilot him and say whatever happens it's tough; it's your _____.

ENOCH: Suppose I'm a truck driver and I can't have an accident that's my fault on my record, and I'm involved in an accident. And the other side kind of knows that and so they offer to settle for the maximum of my insurance policy. In my view they can't prove it, and the insurance company's _____ they can't prove it, and I insist I don't care what the evidence is going to be, I'm going to defend this because I cannot have that finding on my record. And the insurance company says: But they're offering to settle on the policy limits. I don't want them to settle. Now can the lawyer against the wishes of the insured walk into that room and insist on a settlement. A questionable whether or not it could be settled, tried and found under the policy limits or over the policy limits. It's a questionable issue that insured insists for a number of reasons: I don't want to settle this case; I don't want to try it; I wasn't at fault. Can the lawyer just go in and settle the case without the insured's permission?

LAWYER: No.

ENOCH: Then at that point when they are trying the case, the insurance company is vicariously liable for the negligence that results in a higher verdict, then the insurance company has an obligation to interfere in the defense of the case? I mean what's going to happen?

LAWYER: I think where this is headed is you must recognize two separate duties that that carrier has. One is to provide that defense. If you say I don't want it on my record, then that is something the carrier has got to live with. That doesn't absolve them of the responsibility to follow through on a good defense for that insured. They've got to continue to follow the lawyer, make sure he's doing right, make sure he's conducting the defense right because after all that's what they obligated themselves to do contractually and have an independent tort responsibility to accomplish.

ENOCH: If they said we will go ahead and pay for your lawyer and you just hire whatever lawyer you want to represent you, the insurance company would still be vicariously liable?

LAWYER: As long as they tender their limits of the policy as far as that obligation they are done. They still have a responsibility to provide him competent counsel. The only other thing that I would like to say is the importance of this case and why what I believe is the motive behind the case. I do not believe that my pleadings can be construed narrowly to say that all I asserted was a vicarious claim. I believe that my claim showed a direct cause of action against State Farm in the manner and means by which they directed Mr. Bradshaw. At this point I have not had the chance to develop the evidence. I would like this court to affirm the CA's opinion which did in fact remand this case for a trial on the DTPA, Art. 21.21 and negligence claims against State Farm, which I intend to demonstrate both directly and vicariously at the TC.

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REBUTTAL

ENOCH: You've indicated that it's possible that if the insurance company takes the duty to defend it may have a duty to hire a competent counsel; or it may have an obligation not to interfere in the work of the lawyer with the insured. It appears from the CA's opinion that all that was pled in this case was the vicarious liability with the possibility that there might be a direct claim based on this motive theory that the insurance company actively interfered. Should this case be remanded to the TC to flush out this allegation against the insurance company's _____ interference or should this be a remedy case?

GARDNER: I believe that the CA should be reversed and rendered, that summary judgment should be affirmed at the TC. The CA is correct and counsel for respondent acknowledges that its statement of the nature and result of the case is correct in the facts. And that in stating that the only allegations were of negligence and of malpractice by the attorney, and how the question of motive comes into play, I don't believe the CA suggested that there was direct interference because they said the only claim that was negligence and it just makes no sense to have a claim of motive for negligence. He never pled control. He never pled any direct conduct of the insurer. He never pled interference by the insurer. The only allegations he ever pled other than a Stower's claim were negligence by the attorney with purely vicarious liability by the insurer. And under these circumstances where the counsel, and there's no allegation that counsel was incompetent or inexperience.

The situation is one of purely the type of claim that could be manufactured and we believe that it was crafted for the purpose of getting funding for the excess judgment by going to State Farm, putting liability on State Farm for the full amount of the excess judgment in this case. And if this decision of the CA stands it will create the same types of public policy concerns that this court spoke of in Zuniga and Gandy, that will allow policy holders and injured third parties to drive a wedge between counsel and the insured, cause distrust by counsel of its own client, and also end

up reversing the positions of the parties. In situations like this, as we've pointed out in our brief and I don't mean this to be a reflection on counsel for respondent that he represented the injured third part in the underlying suit and now he is suing in the name of the insured. Clearly the ultimate real party in interest in this case is the injured third party.

CORNYN: You're not suggesting that the interest of the insurance company and the insured are completely aligned are you?

GARDNER: In what sense your honor?

CORNYN: You said there shouldn't be an opportunity given as in Gandy to drive a wedge between the insured and the insurance company...

GARDNER: The insured and counsel. The counsel and counsel's client, the insured, drive a wedge between them. The lawyers would constantly be aware that it's going to be targeted for anything where there's an excess judgment anything that an insured and its lawyer and a plaintiff's lawyer can find where they can try to pend malpractice liability on the insurance carrier and thereby transferring the entire excess judgment to the carrier.

CORNYN: Under the current state of the law, the insurance defense lawyer's already walking on pins and needles isn't he or she because the insurance can sue the lawyer, can it not under the Canal case, and under also some other authorities? It can be a subrogation action against a lawyer by the insurance company, correct?

GARDNER: That's what Canal held.