ORAL ARGUMENT – 01-15-03
02-0090
UTICA V. AMERICAN INDEMNITY

ALEXANDER: The court should reverse and render judgment that Utica had no duty to defend, and hence no duty to indemnity for a single threshold reason. And that is because every single plan that was alleged against the insureds in the underlying action required the occurrence of excluded conduct in order to be actionable. That excluded conduct being the rendering of professional services. In this case through the administration of anesthesia during surgery.

O'NEILL: Where was the administration of anesthesia professionally negligible? Where was professional judgment brought into that analysis?

ALEXANDER: We don't know if it was or not.

O'NEILL: Isn't that critical though to the exclusion?

ALEXANDER: Absolutely not. I think the thing to do here (let's turn to Tab 1 on my handout), is to quote the language of the exclusion. The exclusion is, the insurance is the insurance does not apply bodily injury due to rendering, or failure to render any professional service. One thing that you will notice is is that the word "negligence" does not appear there.

The other thing that you will notice is is that it does not require that the professional services be rendered by the insured that is claiming coverage. So this is negligence. And let's back up and consider how this is done. We applied an 8 pointers rule in terms of determining the existence of coverage. That means that we look at the allegations of the petition and we look at the language of the policy. In every case that the courts have decided, the most recent one being King, focuses on the language of the policy,

You don't inquire at the defense stage, Was the rendition of the services negligent or not? As it turns out in this case the allegation was that it was negligent. That happened to be the allegation. But critical to the inquiry here is the fact that it was rendition of professional services, whether negligent or not. That is the operative language.

PHILLIPS: Let me get the facts straight. The insured here was an anesthesia group. And they had some type of contract with this outpatient surgery center, which was, however, a different entity. It may have had some of these doctors that owned it, and maybe some others. Surely you don't have a surgery center with no surgeons. And the person who is primarily at fault in this situation was hired by and was an employee of this surgery center.

ALEXANDER: Right. Although the pleadings on that are a little confusing.

PHILLIPS: Forty-four people were hurt, and have sued, and settled, and are no longer around here. And they sued, and I assume got some money from the anesthesiology group under its professional...

ALEXANDER: Under the professional policy and also under the American Indemnity policy, a general liability policy that was the policy that was right after the Utica policy in terms of time.

PHILLIPS: So the difference between those 44, at least 4 is that those 44 came a little bit later?

ALEXANDER: No. It's my understanding is that 40 or 44, however many, there was a number who settled out earlier on _____. It's only when we got up to about the 18th petition. All of these occurrences were back in 1992 is my understanding. And so it was only up to the 18th petition that UTICA was called upon to render a defense. And so at that point there was only four plaintiffs left.

PHILLIPS: Couldn't hear very good.

ALEXANDER: What's interesting about it is it's not entirely clear, because we don't have the first through the 17th petitions as part of the record. I think a logical surmise is, that by the 18th inventive plaintiff's counsel were able to say well let's snag in some additional insurance and let's come up with the 26 allegations.

PHILLIPS: Is there anything in this record about whether the surgical center was ever sued and whether its insurance was ever implicated? It's not in here anymore.

ALEXANDER: Yes. I didn't comb through the record. I don't know whether we know whether the surgical center was on the hook or not from the record. The people that were involved in the underlying suit would absolutely know that and can tell you.

PHILLIPS: Now it's also clear the anesthesiology group was trying to get insurance for anything that might happen to it. So they bought a general liability policy, which is a cheaper policy because that's weird things happening to you, and then this professional policy which is an expensive policy, because you are going to get sued all the time.

ALEXANDER: Right. And they ultimately recover under the - in other words they are ultimately covered under the professional liability policy.

PHILLIPS: But are they.

ALEXANDER: They were.

PHILLIPS: If this went to trial and the jury failed to find professional negligence would

they be covered under that policy? They might get a defense, but would they be covered?

ALEXANDER: Probably not.

PHILLIPS: So what we're forcing these anesthesiologists into is either calling up on the stand and saying boy I was really negligent, or are we forcing them to crawl up and say no I'm not a bad doctor, people should still come to me. And in that event they are not going to have any coverage from their general liability policy because you are are long gone and they are not going to be covered by their professional policy?

ALEXANDER: I think that the tough thing about this case is that you can hypothecate and that's what you've done. You can't hypothecate a situation in which there is not going to be coverage. I think that one of the things that you are going to find...

PHILLIPS: Aren't we supposed to interpret these things reasonable _____ the protection of the insured and the fact that _____ policies. You are working with other policies and to try to provide them with coverage.

ALEXANDER: Everything was right up until the last thing you said. What we are trying to do in these cases, and the overarching policy concern here should be to give effect to the language of the policy as written. The legitimate expectations of the parties as framed within the language of the policy.

PHILLIPS: Can't understand clearly.

ALEXANDER: It may be that out there there would exist some umbrella policy that would ultimately cover them in this type of a situation. That's not _____ because we don't have that in the record. But I think that the thing that you have to recognize, and this is kind of the hard reality, is that if you want to talk - and let me spend a little time on the policy concerns. You can as you have done hypothecate a situation which there is no coverage. On the other hand this is what's critical. If you go with the way that they have framed the test, you can hypothecate situations where coverage for the general liability carrier can be manufactured in every case like this. There is no end to the inventiveness of plaintiff's counsel. In this case there is 27 allegations. In every case you can think of, you can come up with some antecedent act or some post-act that says well that's not per se excluded, hence there's coverage. So that's the reality.

On this side with that is I hypothecate no coverage. On this side if I hypothecate the situation of manufactured coverage, what you have to do down the middle is apply the language of the policy.

O'NEILL: Let me hypothecate some more. Let's say that this anesthesiology group had taken these vials and given them to another anesthesiology group. Somebody needed some additional vials and they said give us some, and they shipped them over to them. And these doctors

in this group never used them. The allegation is that they didn't supervise the maintenance of the vials, that that's an administrative negligent type act. Because these doctors would not be performing any sort of professional service that caused the injury. There would be coverage in that situation wouldn't there?

ALEXANDER: Probably not if I'm following the hypothetical correctly. In other words, what you're saying is that this is another group now that has administered. What you would have to still look for is what was the cause of the injury? How were the people injured? Were they injured by the rendition of professional services? If the answer to that question is yes...

O'NEILL: But they are claiming that the anesthesiology group in my hypothetical injured them by not carefully monitoring the maintenance of the vials.

ALEXANDER: But the bottom line is how did the injury ultimately occur under your hypothetical? Was it through the rendition of professional services? The answer is yes. What you are concerned about is yes, but it wasn't administered by these insureds. Let me give you a 5th circuit cite. It's Canutillo. 99 F.3d 695 at 704-705. We find that Texas law is clear. Where a claim against an insured would not exist but for a conduct explicitly excluded by the policy, the defending claims are not covered under the policy regardless of whether the insured against whom the derivative claims are directed actually engaged in the excluded conduct.

Go back to the language in the policy. The policy as written does not require either that the rendition be negligent or that the person who rendered the professional services was an insured. And let me give you a San Antonio case. J. Duncan wrote it. Give you an example of how this can come up. That was a case against a youth home. The allegation of negligence was you should not have allowed this young girl to leave the premises. When she did leave the premises she was sexually assaulted. The exclusion was for an assault and battery. Now the excluded conduct, the assault and battery, was done by an unknown person. We have no idea who it was. It was not done by the youth home.

The suit against the youth home was kind of the same thing. Well you didn't negligently supervise. You did not as in your hypothetical. But the court says because the, and this is the way they put it in that case, if you turn to Tab 3, without the underlying assault and battery there would have been no injury and no basis for suit against the defendant youth home for negligence. In other words without the occurrence of that excluded conduct there would have been no basis for a suit against anyone and therefore the alleged negligence of the youth home was not covered.

Back to your concern. Are you saying that there could be circumstances where there's no coverage? There is. And in case after case that's true.

PHILLIPS: No professional negligence has been alleged here. Would you have coverage or would you still be excluded on but for, because it had to be administered?

ALEXANDER: If within the language of the petition...

PHILLIPS: Can't hear.

ALEXANDER: The answer to that is it would still be excluded for this reason. Back to the creativeness of the plaintiffs. The concern is legitimate but people can draft their pleadings so that they just don't mention the fact that the only way that these people contracted it was through the rendition of professional services. They go around this. This is what the 5th circuit has said about that. Even if a plaintiff styles a claim so that it is not one that is enumerated in the exclusions, the plaintiff's claim is still barred when the underlying conduct essential to the plaintiff's claim can fairly be read to arise out of a conduct that would establish an accepted cause of action.

And there are a number of cases that stand for this proposition. It's another 5th circuit case. It's Western Heritage, 998 F.3d 311 at 313. There the court said, if the petition does not contain sufficient facts to enable the court to determine if coverage exists, it is proper to look to extrinsic evidence to adequately address the issue. In other words, you may have situations where people are trying to craft their pleadings in such a way as to not trigger coverage. But the bottom line is, in this case the only way that any of these 44 people could have sustained any injury whatsoever was through the rendering of professional services, ie. the administration of anesthesia during surgery. That was the mechanics of all of them.

* * * * * * * * * * *

RESPONDENT

CAUDLE: This matter involves both the duty to defend and the duty to indemnify. Now in the CA, the coverage issues that Utica briefed were the same under both duties. The CA addressed those coverage issues. It didn't mention duties to indemnify other than a couple of times.

I want to address the coverage issues and do it in the context of the duty to indemnify and show that the CA's judgment in that regard was correct, although perhaps a little bit lacking in language.

I don't know how many times I heard Mr. Alexander say look at the language of the exclusion. This injury does not apply to bodily injury due to rendering or failure to render any professional service. What meaning is given to the language "due to" if it just means in the context of? You can sell this fentanyl to another group, to somebody else, and they administer it. Is that due to the rendition of professional services? All that is, is the context.

ENOCH: I understand what the exclusion deals with. But explain to me what duty the anesthesiology group has that it can be insured for where the injury results from the administration of medicine? Explain to me what duty the anesthesiology group in this office has to A, B, C out there for maintaining this medicine unadulterated?

CAUDLE: I believe they have statutory duties under federal laws, and I believe some state laws regarding the control or the storage of controlled substances.

ENOCH: If they don't do that a public member has a claim against them because of the worry and concern that this isn't properly safe? You argue they've got a duty to A, B, C out there because there's federal law that talks about how you maintain drugs. I'm saying so a citizen who thinks that they are not maintaining the drugs safely has a suit against them for mental anguish or whatever?

CAUDLE: Obviously the claimant off the street has to have been injured in some way.

ENOCH: But the only way this person ought to be injured is that they seek professional medical care, and they receive professional medical care.

CAUDLE: They have to seek professional medical care from somebody.

ENOCH: But if they do that, then doesn't this policy exclude coverage if the injury is a result of receiving professional medical care?

CAUDLE: Only if you want to rewrite the policy and strike out the words "due to" and insert "in the context of."

ENOCH: I don't know how a jury can find that that's not medical care. How is that not a direct, related to - direct as you can possibly get - that that was a result of medical care that they got injured?

CAUDLE: It goes back to the basic rules of construction for insurance policies here in Texas. Ambiguities in policies are construed in favor of coverage with the special _____ in the context of an exclusion. Any reasonable interpretation of the exclusion that would afford coverage should be adopted even if the insurer offers a more reasonable construction. If your belief is that due to or could be substituted within the context of, and that's a reasonable construction. Fine. That doesn't change the fact that due to should be a reasonable construction of that clause is that it means approximate cause.

OWEN: Isn't part of rendering professional services maintaining the drugs properly? I mean if they hadn't kept it at the right temperature or they knew that they could get adulterated that part of rendering professional services?

CAUDLE: First, I would say, that the fact that the what they are calling the antecedent acts of negligence, whether or not they were professional services or not has not been brought forward by Utica in this court. Beyond that, no. If you look at the case law that construes the term "professional services" that refers to an exercise of skill, judgment, specialized _____ peculiar to their profession.

OWEN: So if my doctor puts the serum out in the window sill where it gets really hot, and it spoils, and then he injects me with that, that's not rendering professional services?

CAUDLE: I don't believe so. Because there are all sorts of businesses that carry perishable substances that they sell to the public. Those are general duties. Whenever there are product liability issues, you need to maintain the purity, the unadulterated condition of the products that you sell to the public. That is not a duty that is peculiar to an anesthesiologist.

HECHT: But I suppose if a physician took too much drug out or too little drug out, that clearly would be professional services? Administered the wrong dose.

CAUDLE: Yes.

HECHT: And if he contaminated the needle himself in the process of administering the dose, you would say that was professional services?

CAUDLE: I'm not sure exactly how...

HECHT: He wiped it on his pants. He dropped it on the floor. He sneezed on it. He sat there and looked at it, and he knew he had done something wrong. But he said oh, well, maybe it won't hurt and he stuck it in anyway. That would be professional services.

CAUDLE: Probably.

HECHT: If they knew that when the drug had come into the building the nurse who took it, receptionist who took it, physician who took it, whoever it was, if that person had known that in the process of taking it it had been mishandled in such a way that it might be contaminated would that be professional services?

CAUDLE: I think you're getting pretty far filled there.

HECHT: When you say do to is proximate cause, you're really incorporating the same Union Pump problems that we struggled with trying to see how attenuated the conduct is from the injury.

CAUDLE: I'm not familiar with the Union Pump case. What I'm trying to do is offer a reasonable construction of this exclusion that would afford coverage. A reasonable construction of the exclusion is that but for requires that a rendition of the professional services be a proximate cause of the injury, and that the reference to professional services in that this is an exclusion from the business liability coverage reported by this policy is that it refers to the professional services of the insured seeking the coverage.

JEFFERSON: That's where I have a problem. When you look at that definition it's

irrelevant when you read it who the actor is. I mean it doesn't say bodily injury due to the insured's rendering or failing to render professional services. It doesn't define actor. It makes the actor irrelevant. And so the focus has to be on whether or not professional services were rendered.

CAUDLE; First, Utica first raised the argument of whether or not the provider of the professional services needed to be the insured, or it could be somebody else. In their reply brief in this court, that's the first time we've heard that. Beyond this issue of waiver though, the language of the policy really doesn't support that kind of construction. If you look at the policy, you've got a section that is entitled "Coverage." Under that you've got a part that's entitled "Business Liability." It says, we will pay those sums if the insured becomes legally obligated to pay as damages because of bodily injury to which this insurance applies. Then you drop down and you've got an exclusion section. "Applicable to business liability coverage this insurance does not apply to (drop down a couple of pages)...bodily injury due to rendering or failure to render professional services.

By talking about exclusions to the business liability coverage, you are automatically talking about insurance for damages for which the insured _____. An insured doctor who did not render medical services could not be liable for someone else's negligent rendition of medical services, whether it be the hospital, some other anesthesiology group that they sell the products to or what...

ENOCH: What would be the proof that you say you have to bring to the court that would entitle you to a judgment that would cover this insurance policy, that would have damages covered by this insurance policy?

CAUDLE: I think we proved that in this matter. We proved the insuring agreement. They are legally obligated to pay.

ENOCH: You say that they are legally obligated to pay. What would be your proof of liability on the part of the anesthesiology clinic for having contaminated medicine that would thus entitle the injured party to be compensated in damages?

CAUDLE: In this matter that proof is because Utica breached its duty to defend. That's a legal consequence of their breaching their duty to defend.

ENOCH: Their argument that the underlying liability can only be predicated upon providing professional service, that's excluded under the policy, and, therefore, there's no coverage. You're saying this is not professional service, therefore, there is coverage. And I'm going to this medical service. You're saying it's not medical service. And so I'm asking you what is it that you would then prove to establish liability of the insured? What would you prove to establish liability of the insured?

CAUDLE: How J. McGraff in the Mitchell lawsuit, how that would have played out I

don't know. I understand he was inclined to grant a negligence per se summary judgment so that only damages was submitted against the anesthesiology group. My point is though, that Utica in its reply brief admits they are not challenging that the insureds were legally obligated to pay. That _____ should just take it out of the case, not only by their admission but also by the fact that they breached their duty to defend. As a consequence of breaching a duty to defend an insurer doesn't get to go out and tell its insured that you weren't legally obligated for the settlement. That's a legal consequence of breaching a duty to defend.

ENOCH: If the judge found that there was negligence per se could it not have been negligent - isn't it negligent per se for a doctor to administer contaminated medicine to a patient?

CAUDLE: That wasn't the negligence per se claim.

ENOCH: Was it in the securing of the locker?

CAUDLE: It was the security of the controlled substance.

O'NEILL: It was violating the federal regulations.

CAUDLE: I believe so, but again Mr. Jordan was a little more familiar with the underlying lawsuit.

OWEN: Let's look at the exclusion and let's say it says it does not apply to it. It applies only to bodily injury and it has that definition. Would you be arguing that this incident is covered or not covered? If this were the insurance clause, and it says this insurance applies only to bodily injury due to rendering or failure to render any professional service, would you be covered?

CAUDLE: If I'm ICA or the Guarantee Association, I'm going to defend the doctor who is alleged to have exposed the claimant, the patient, to defective _____. I'm certainly going to reserve my rights on the doctors.

OWEN: My question is is it covered or not?

CAUDLE: I don't think so. At least not with non-treating doctors. What professional services do they render.

* * *

JORDAN: I wanted to start out by mentioning something about the unique role of my client, the Guaranty Association. My client is not an insurer at all. It's an organization created by statute to carry out certain obligations that the statute defines as covered claims. And those claims arise under insurance policies issued by an insolvent property casualty insurer.

HECHT: Who was the professional _____?

JORDAN: ICA. They became insolvent in 1997.

O'NEILL: They are focusing on the injury causing event, and not on the negligent act per se. So the way I understand their reasoning is, let's say you had a lab or a company that maintained this sort of anesthesiology and did that negligently. As long as the cause of the injury involved the rendition of medical services that triggers the exclusion?

JORDAN: That is their position. And I think it raises an interesting thing that I thought of in preparing for oral argument. The way in which most companies purchase product's liability coverage is through a general liability policy. So if Bon Fizer _____some big pharmaceutical company, that's how I get products coverage under a policy like this. Under Utica's formulation of the policy though, every prescription drug I make if I'm Fizer is going to be prescribed by a doctor unless it somehow gets diverted outside the chain and went to David Thomas. But that means that every time that my prescription drug has some sort of problem with it, it's going to have involvement in whatever injury somebody gets from taking my drug will have been caused by the rendition of professional services a hundred percent of the time.

HECHT: Do you think this is an either or situation? It's covered by one policy and not the other, or the other policy and not this one, but it can't be covered by both or it could be covered by both?

JORDAN: I think in this case there are claims that were covered in the ICA policy, and claims that were covered under the general liability policies.

HECHT: Is that because of the nature of the claims, or is that because of creative pleading?

JORDAN: I think in this case. And I think this is fairly a bazaar set of facts. And I don't think the fact that the allegations legitimately involve those sort of administrative negligence and literally – the storage of the drugs. It doesn't take professional training skill knowledge to understand that a lock is a much better security mechanism if the key isn't hanging right outside the lock, which is the case in this instance. That doesn't require the rendition of medical services or even any kind of professional skill or knowledge to understand that. That is a legitimately an administrative sort of negligence like the claim in the North River case where I have a window that I think is secured, but I really haven't secured it well enough to keep the suicidal patient from unscrewing the window and jumping out of the window. Now a doctor doesn't know any more than anyone else about how to secure a window. But the fact that the window could be opened by the patient was the cause of their death.

Now in that same case, they had a professional malpractice claim where they said you didn't observe the patient. You knew this person was suicidal, and nobody was watching.

If you had been watching you could have stopped them from unscrewing the window and jumping out of there. And I think that this case - the Mitchell case is very much the same way in that you have both nonprofessional negligence that's not a manufactured trumped up just sort of artful pleadings sort of claim. If David Thomas doesn't get into the drugs and contaminate them, there is no harm to these plaintiffs.

HECHT: Well that's true, but if the plaintiff doesn't seek medical care there's no harm done either.

JORDAN: If there's no rendition of medical services, yes. However there was no necessity to prove the negligent rendition of medical services in order to prove the negligence per se claim. The plaintiffs could have dismissed if their malpractice claim, their 4590i claim against the treating physician and still proven liability on the negligence per se claim. And the very clear proof of that is that you had 10 defendants, 9 of whom didn't do anything to render any professional service to the one claimant. So Dr. Pedebone(?) was the treating physician. Dr. Pedebone(?) was not. Well what about the claim against Dr. Pedebone(?) didn't treat the patient. And you have to look at coverage for each claim. Dr. Pedebone couldn't possibly have been involved for rendering medical services to someone not his patient. This court has in many opinions talked about what kind of conduct does it take for a doctor to even have a professional _____.

ENOCH: I can understand where they failed to keep drugs that they know would be dangerous under lock and key. The drugs get stolen or somebody gets harmed by going in and having access to it. It would be your typical premises liability. You've got to be careful that you don't have stuff on your premises that people coming on and off are going to get injured by. If the doctor goes and takes the medicine out of the cabinet, sticks a needle in it and it's contaminated, and give it to a patient, how can the doctor - if I come forward with evidence that it's beneath the practice for the doctor to assure that the medicine hasn't been contaminated, that's a professional call. Irrespective of how its kept by the clinic it's still a professional call on the doctor to make sure that the medicine they are giving you is not contaminated. And follow whatever protocol they have. How would Baylor hospital or Seton hospital, one of the hospitals here, have a general liability policy that wouldn't be responsible for every malpractice claim made against the physicians that work there because almost always involve some piece of property that the hospital had that gets improperly used? Maybe it wasn't properly labeled. And all sorts of things that the reason the doctor injects the medicine as opposed to a patient doing it on themselves is because the doctor is supposed to make the medical judgment that this is the safest thing to do.

JORDAN: There's a couple of things I can point out in answer to your question. First off, as to the treating physician it might be a valid argument that the treating physician, that those professional duties sort of relate back. Although this court has said that before somebody has a physician/patient relationship they have to take some overt act to treat the patient. So you would be taking that duty back. But as to the treating physician that may be a valid argument. But as to the 9 physicians that didn't render any medical treatment, how can you say they had any medical/professional duty to somebody that wasn't the patient. As to coverage you might sweep the

training physician claim under the medical malpractice policy...

ENOCH: But this is an injury that occurred as direct decision by a doctor taking the medicine and injecting the patient. So how is this other doctor liable? What duty has this other doctor - was the doctor supposed to have undertaken to assure that this doctor who was going to provide the service will check for the contaminated medicine? It's not anticipated that a person walking in and off the premises would be injured by this medicine that may or not be contaminated in that cabinet whether it's locked or not.

JORDAN: But there were claims against 9 doctors who didn't make any decision to render any kind of anesthesia - administer any anesthesia to that patient. For coverage purposes each claim has got to be looked at claim by claim. But the claim of Donna Cochran against Dr. Ente(?) it may be a different claim than the claim against Dr. Pedebone. If one of them is the treating physician perhaps that's covered under the medical malpractice policy, but if it's a nontreating physician I don't see any way that it could be covered under medical malpractice policy.

* * * * * * * * * *

REBUTTAL

ALEXANDER: I would like to address four points in rebuttal. The first one is J. Enoch's question about could a member of the public come in and sue because of some unarticulated concern about improper storage. And the answer is no. And that is the key. There would be no standing if that person came in. The only way you could come into court and prosecute a cause of action is if you had received the anesthesia during surgery.

If you look under Tab 1, and I think this is critical. This is a statement of the test, the majority approach by the Ohio CA. It says that the covered cause of loss will be covered where 1) the claim provides a basis for a cause of action in and of itself; and, 2) does not require the occurrence of the excluded risk to make it actionable. Let's apply that here. Could negligence storage state a cause of action? Answer. Yes. But 2) does it require the occurrence of the excluded risk, that is the rendition of professional services to make it actionable? Absolutely yes. That is the key. In this case there would not be a single person who would be in court but for the administration of anesthesia during surgery, which everyone agrees is the rendition of a professional service. What is excluded here is the conduct.

Point 2. J. Jefferson asked the question of does it have to be insured, the insured that administered it? Answer no. Canutillo. The 5th circuit in Canutillo analyzes that. It's also like the Burlington case out of San Antonio. J. Duncan saying that there is no coverage for negligent entrustment even though in that case the excluded conduct was permitted by an utterly unknown person. A sexual assault off the premises. Once again what's excluded is conduct.

Number 3. J. Hecht asked the question can you hypothecate a situation where you have concurrent causation or is it always mutually exclusive? The granddaddy of the concurrent

causation cases was actually cited by J. Hecht in the Lindsey opinion. It is in footnote 26. The case was Partridge out of California. In that case there was a situation where people were riding along in a car hunting jackrabbits. This fella had a gun with a hair trigger on it. He filed it down. And he decided to shoot off the road and jostling along shot the woman next to him. She was paralyzed. In that case the court says, well we've got two concurrent causes here. One was the use of the vehicle and it's cited for that purpose. That caused it to jostle. But this was not a situation where that was required for there to be an action with respect to the gun. Why? Because that was happenstance that it was in the vehicle. It also could have occurred by walking through the woods or someplace else.

We don't have a happenstance case here. The classic example of the happenstance case in Texas was _____, a decision by the Corpus Christi CA. It's under Tab 3. What happened in W_____ was a situation where a fellow was loading a truck, the jeep had broken down, they had to fix the tire. And in the course of fixing the tire he took off his gun belt to load it in the car, dropping it, and it shot, and it killed somebody. And the argument there was well in that situation it was happenstance. The liability could be based solely on the negligent handling of the gun because it was mere happenstance. We don't have happenstance here. We don't have a situation where there is any number of ways that these patients could have been injured, and they just happened to have gotten it through the administration of anesthesia. All 44 persons suffered injury in exactly the same way: through the rendition of anesthesia, excluded conduct, and there is no other way it could happen.

I want to turn to J. O'Neill's point because I don't think I adequately answered it the first time around. You had asked the question don't we have to have negligent rendition? There is confusion in Texas law on this point, and it needs to be cleared up.

Under Tab 2, I quote the McManus decision. In McManus this court 20 years ago used unfortunate language and an unfortunate analysis. The focus has to be on cause of injury. It's not the cause of action. In McManus, and they picked up on this, the court had a negligent entrustment case with respect to the use of a motor vehicle off the resident's premises. It was a collision of two trail bikes. And what the court said was, there is a majority approach and a minority approach. This court correctly followed the majority approach. But then where the court veered off the road was, the court said because negligent entrustment requires as an element of the cause of action negligent operation of a vehicle, then these are not independent causes or dependent causes and there's exclusion.

I have highlighted some language and deleted the word "negligent" because in that case you did not have to be - the riding of the vehicle did not have to be negligent in order to be excluded. The conduct was the use of the motor vehicle off the premises.