ORAL ARGUMENT – 10/20/04
03-0957
ALLSTATE INSURANCE V. HALLMAN

STACY: We believe there is one overall issue being presented to the court in this case. And that is, can an individual go out and lease their property to a commercial mining company for the purpose of mining limestone and then expect their personal homeowner's policy to provide insurance coverage for them when they get sued as a result of that mining operation? We believe as the TC found the answer to that question is no. The CA reversed that and sent it back for a remand on other issues.

Under the facts of this case, we believe the answer is no because 1) there was not an accident here that would constitute an occurrence that would trigger coverage to begin with; and even if there had been an accident or an occurrence we believe the business pursuits exclusion under a personal homeowner's policy would apply to preclude coverage in this case.

There are a couple of issues that I need to address for the court that are outside the record. There are couple of issues that I just learned about a couple of days ago, which to some degree may affect the status of the case or the parties. One is that, I've learned that the underlying case against Ms. Hallman was actually tried about 3-4 weeks ago. And Ms. Hallman won and there was no finding of liability against Ms. Hallman. There was no judgment entered against her.

HECHT: Did the insurer provide a defense or not?

STACY: Yes. Allstate also provided a defense and all of the defense costs in that underlying case have been paid for by Allstate.

HECHT: Is this moot?

STACY: No. I don't believe it is. One other issue, Ms. Hallman passed away 5 days ago. I just wanted to bring those issues to the court's attention. But there is still a justiciable controversy here. Because if the TC is correct, then Hallman's entitled to her attorney's fees in this declaratory action.

OWEN: It wasn't clear if this was a suit over defense costs or coverage, or both.

STACY: Well it was all. We filed a motion for summary judgment asking for a ruling of no duty to defend and no duty to provide indemnity. Hallman filed a counter-motion for summary judgment asking the court to rule as a matter of law there was a duty to defend. So all of those issues have been presented to the court.

There is at this point, there is no issue that we're going to ultimately have to

indemnify or pay the underlying judgment because that case has been tried and there is no judgment.

BRISTER: The trial judge assessed no attorney's fees in this DEC action?

STACY: The TC assessed no attorney's fees in this action.

BRISTER: So at most if we agree with them we've got to remand to the TC to figure out what, if any, fees.

STACY: That's what the CA's ruled. We have some dispute with that issue. The CA before they took this case sent it back to the TC to resolve the attorney fee issue, and a final judgment was entered by the TC finding neither side was entitled to attorney's fees.

OWEN: As between Allstate and Ms. Hallman?

STACY: Yes.

OWEN: So you have not paid defense costs?

STACY: I'm sorry. The attorney's fees in the declaratory judgment action.

OWEN: But you are suing here to get your defense costs back?

STACY: No. We are not asking for defense costs back.

BRISTER: All we are here on is figuring out attorney's fees and this DEC action, which the trial judge said it was a close enough question - nobody gets any.

STACY: I think that the court should resolve the two issues that were the basis of this appeal...

BRISTER: Yes. But we've got to have a case in the controversy.

STACY: And there is. The controversy here is, if the TC is right and we were entitled to a summary judgment based on the fact there was no occurrence or even if there was there was a business pursuit exclusion that applied. If the TC is right on that, then they get no attorney's fees.

OWEN: But the TC has now in a final judgment says they don't get attorney's fees anyway. Right?

STACY: The trial judge found that in a final judgment, but the CA reversed that and said they are entitled to attorney's fees in the DEC action.

OWEN: You've told us since then that that's all been superceded.

STACY: I'm probably not making myself clear. There were two issues on attorney's fees. One, is whether Allstate had a duty to defend the underlying action and pay the attorney's fees in the underlying action.

OWEN: And you're no longer contesting that.

STACY: That is not an issue any longer because that case is now resolved and Allstate did in fact pay all of the defense costs in that underlying action.

WAINWRIGHT: And is not seeking those back?

STACY: And we're not seeking those back. The other issue on attorney's fees, which is still the justiciable controversy here is, does Hallman get attorney's fees in the declaratory judgment action? If we're right, there is no occurrence or the business pursuit of exclusion applies, they don't get attorney's fees.

BRISTER: On remand.

STACY: On a remand. If they are right, and you uphold the CA's ruling, then there is necessarily a finding that there was an occurrence here, business pursuits exclusion doesn't apply and, therefore, they win the Debt action, and, therefore, they get to go back to the TC at least the CA said that for attorney's fees.

WAINWRIGHT: Is the basis for award of attorney's fees the declaratory judgment action solely?

STACY: Is the basis for the attorney's fees the declaratory judgment action? Yes.

WAINWRIGHT: Because you are confusing me when you say Ms. Hallman's rights, she's entitled to attorney's fees. Attorney's fees under that act is entirely discretionary. It's not ch. 38 of the Civ. Pract. & Rem. Code.

STACY: I agree with you but the CA's reversed and remanded the case for attorney's fees, determination by the TC. Because they found there was an occurrence and they found business pursuits did not apply, they remanded the case to the TC for attorney's fees. And so if this court allows that ruling to stand, then we will go back to the TC for a resolution of attorney's fees.

BRISTER: Did the TC indicate in this case why it was awarding attorney's fees to neither side?

STACY: No. It did not say why.

OWEN: And counsel has made it clear that they still are doing fuss with you over the attorney's fees in the declaratory judgment action.

STACY: That's my understanding. Even though all of that has happened, I still think we are back to the same issues. And there is a justiciable controversy. There is still monetary issues to be resolved. And the two issues here are 1) was there an occurrence, an accident, that would trigger coverage? and 2) even if there was an occurrence does the business pursuits exclusion apply here? Those are the issues, and I think those are still clearly the issues.

BRISTER: When did you find this out?

STACY: I found out two days ago.

BRISTER: Next time, please let us know immediately. Whether a case is moot or not is an important question before this court has oral arguments.

STACY: And I found out really by accident Monday afternoon when I talked with the defense counsel in the underlying action. I assume opposing counsel may have known earlier, but I was not aware of it.

We still have these two issues. And in relation to the duty to defend, all the parties agree and cite cases saying that the court looks at it the facts alleged in the underlying case and you don't look at the legal theories. And that the court must accept those facts as true. And the facts in this case that deal with the issues of whether there is an occurrence and whether there is a business pursuit exclusion here, which are very important issues that are looked at every day in this state by insurance companies and courts, these two issues. And particularly in the business pursuits exclusion there is really an absence of court law that helps us to determine how that's to be applied.

HECHT: You think Pennington controls?

STACY: I think it should. Obviously it does not. It's a CA case and it's a 1991 case. And in Pennington the court very clearly said this is a case of first impression to us. But we've had - really I'm not aware of case law since Pennington that has helped the insurance companies and the courts deal with this business pursuits exclusion.

OWEN: In your brief when you say the statement of the case, you say the declaratory judgment actually was about coverage. Did you mean by that the duty to defend as well as coverage? Because I took it from your briefing that all we were talking about was coverage and not the duty to defend. And that can make a difference.

STACY: I think coverage meaning both: duty to defend and whether or not there was a duty to indemnity.

OWEN: Was it clear that that's what the TC thought?

STACY: Yes. We filed a motion for summary judgment on both bases. We said as a matter of law no duty to defend...

OWEN: Okay. I had read the briefs with an eye toward the coverage, not duty to defend.

STACY: We argued both. There is no duty to defend and there is no duty to provide coverage or indemnity. Hallman filed a motion for summary judgment saying as a matter of law there is a duty to defend. That was what was before the TC. The TC denied their motion for summary judgment on duty to defend, granted ours on the duty to indemnify. And then the CA reversed it and said there at least was a duty to defend, and a potential duty to cover.

JEFFERSON: Do we need to look outside the pleadings to rule your way or not?

STACY: I don't think the court needs to look outside the pleadings to rule our way. As I said, all sides agree that the facts alleged in the underlying pleadings are to be taken as true. And here are the facts that are alleged in the underlying pleading, which they cannot dispute and which this court must accept as true. The facts in this case are that Hallman entered into a lease agreement in 1995 with Norton Crushing for the purpose of mining limestone rock underneath her property. The fact is that Hallman knew or should have known of the dangers of mining this rock, including the blasting and the dust associated with the mining operation. Hallman knew or should have known that Norton was not using safe blasting practices. Hallman knew or should have known that Norton's action were causing injuries to the plaintiffs. Hallman knew and should have prevented her property from being used in a manner harmful to the plaintiffs.

In 1999, this lease agreement with Norton was assigned to Meridian, and Meridian continued the mining operations all the way through 2001 at least. The pleading that the court construes says as of 2001, Hallman is continuing to allow Meridian to operate in the same unsafe manner as Norton and failed to prevent the property from being used in a manner that was not harmful to the plaintiffs. They go on and the facts in this case that must be accepted as true is that the mining of limestone was in pits which were located very near the plaintiffs' homes. Plaintiffs were subjected to unbearable dust and noise and blasting operations. There was a pattern of blasting operations to dislodge the rock from its natural formation. Dynamite was being used in a way as to cause injury to the plaintiffs. It was causing shifting of land, large amounts of dust, constant noise and truck traffic. Those are facts that the court must accept as true in looking at these two issues of 1) is there an accident or an occurrence? and 2) whether there's a business pursuit? Again, Hallman cannot dispute those.

The two points generally that's occurrence, the policy says there must be an occurrence, which means an accident. The court has looked as these issues before - the Lindsey decision in 1999, the Cowan decision in 1999. There's been some other cases that we've cited. And

we believe the basic law is this: If there was a voluntary action taken by the insured and what happened is a natural or probable consequence of that...

O'NEILL: And that's the problem I've got, is we would have to find that the extent of these effects were a natural and probable result of dynamite blasting as a matter of law. And it would be hard for us to say that maybe this blasting company was just worse than most. There may be a reasonable way to do it would be to control these effects better than this company did. So it's hard for me on this record to say as a matter of law the extent of this is always the intended and natural result.

STACY: And again, I would point out that the law in this area - we're not talking about the intentional act exclusion. In the intentional act exclusion the court says the insured has to have intended the harm to these plaintiffs. And that's a subjective test. Here the court said we have an objective test and the objective test is is what happened a natural and probable consequence of the act?

O'NEILL: Is what happened - you have to measure that by the what the plaintiffs complaints are. And I presume there could be a matter of degree in terms of responsible dynamite blasting and irresponsible dynamite blasting. I just don't know. So we would have to find as a matter of law that all dynamite blasting will always have these natural and probable effects for there not to be an occurrence.

STACY: I don't think the court does have to find that. Because again, everybody agrees you have to look at the facts pled in the underlying petition and accept them as true. That's it. And as you look at the facts that are now established as true in the underlying petition, then I think if you look at just the facts of this case, the facts of this case are there was limestone mining, there was dynamite, this was being done in pits that were near the plaintiff's home, that Ms. Hallman knew that, she knew of the dangers of the dynamite, she knew that this was causing injuries to the plaintiffs, she fell to prevent her property from being used in this manner, she knew of the damages that the blasting of the rock was causing, and that the dust associated with all of that. If you accept the facts in the underlying petition as true, then I think you look at the facts of this case. And in this case, is dust and noise and the shaking of the ground and truck traffic coming and going, is that a natural and probable consequence of the activity that they voluntarily entered in to? And I think when you look at that, I think you have to say in this case there is an occurrence.

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RESPONDENT

ORR: J. Brister, we learned late last week about Ms. Hallman's passing and about the resolution of the underlying trial. But this case is not moot.

BRISTER: Of course, her passing wouldn't make the case moot.

ORR: That's correct. And because it was a duty to defend case and because the issue of attorney's fees was still x'd in, the fact that the underlying indemnity case had been resolved didn't address the issues as they were teed up.

Allstate moved for summary judgment on both the duty to defend and the duty to indemnify. At the time of summary judgment motions were heard. The duty to indemnify couldn't be resolved as a matter of law in Ms. Hallman's favor because the underlying litigation was not completed. But we still could tee up and did tee up the duty to defend in our partial summary judgment motion. Because the TC ruled in Allstate's favor on any duty to defend or indemnify, of course there was a ruling against us on attorney's fees. The only reason it went back down from the CA is because of an unusual procedure where the judgment didn't appear final because of the absence of disposition of the attorney's fees. When the CA became alerted to the fact that it might not have jurisdiction because the judgment might not be final, we asked the CA to abate the proceedings, allow it to go back down to the TC for the TC to enter - the only logical judgment it could, which is that we weren't entitled to our attorney's fees because we didn't prevail under the summary judgment motion when the TC did that.

BRISTER: Well that's not true. On a DEC action, the loser can get attorney's fees.

ORR: That's true. You're correct.

BRISTER: The TC can give attorney's fees to whoever it wants, or nobody as it did. Right? And what has changed that now we should remand for the trial judge to do it again?

ORR: Well the fact that we've prevailed in the CA, and we were on cross motions for summary judgment as Allstate's counsel concedes. If the CA's judgment is affirmed, that's the end of the case for duty to defend, and we should be entitled to go back and be able to prove up our reasonable and necessary fees.

WAINWRIGHT: But the TC could still say you don't get any fees, whether they are reasonable and necessary or not. But you're saying the trial judge should have an opportunity to consider the fact that if you win that you did win.

ORR: That's exactly correct.

OWEN: Did the TC rule on the DEC action attorney's fees before or after the CA had said there is a duty to defend?

ORR: Before.

SMITH: So you go back to the TC, put the fees aside for a minute, but just the declaration that you seek will be what? What declaration are you going to seek from the TC?

ORR: Well the CA's judgment will control and that will be a declaration that Ms. Hallman was entitled to defense costs. The issue of attorney's fees is still X'd out.

SMITH: Entitled to defense costs. Will that affect the legal relationships of the parties at this point in time? Is there any dispute between the parties with regard to defense costs?

ORR: I just learned this morning from Mr. Stacy in the hallway, and I have no reason to not believe him, that Allstate - there was a period where Allstate stopped paying Ms. Hallman's defense costs in the underlying litigation. When Allstate got summary judgment from the TC they stopped paying defense costs, but of course the underlying litigation proceeded. And then when the CA reversed and rendered that Allstate had a duty to defend, Allstate started paying the defense costs again. There was a little gap there of a few thousands dollars.

BRISTER: Are y'all going to fight over those dollars?

ORR: My understanding as of this morning is that the fight over those dollars ended because Allstate paid them once the underlying trial was completed. So the only outstanding issue is Ms. Hallman's entitlement or not to attorneys' fees.

O'NEILL: And the only thing we can do is conform the TC's decision on that question? However we decide this case it's just going to go back to the TC to decide how to allocate attorney's fees based on the one who lost in its discretion

ORR: That's correct.

SMITH: My question is, the declaratory judgment if you get it, is it going to affect the legal relationship between the parties?

ORR: Yes in the sense that Allstate would be obligated to pay our defense costs. And we would still have a claim for attorney's fees under that ruling...

SMITH: If you are in a trial, you're in the middle of the trial, and your case becomes moot, I would assume you don't have an entitlement to attorneys' fees from the date you filed to the middle of trial. You lose your case. So if this declaratory judgment doesn't affect the legal relationship between the parties, then your fees back to the date when you filed are gone.

ORR: That's not my understanding. The attorney's fees component of a declaratory judgment claim it's all part of the same claim. The declaratory judgment claim can't be parsed that way. The attorney's fees are part of that claim. They are necessarily part of that claim. You can't sever them out. In fact there's an Austin CA's decision, _____ v. Enchanted Rock that says it's an abuse of discretion for the TC to sever the attorney's fees portion of a DEC claim from the underlying debt dispute.

SMITH: So you are arguing that the fees are part of the injury, not cost?

ORR: Indeed. That is correct.

OWEN: Let's suppose I'm a homeowner and I have 20 acres, and I lease my property to someone to run a cow and calf operation on it. And the fence is busted or the fence sags, the cows and calves get out on the highway, people are killed, they destroy some surrounding crops. I call on my homeowner's policy to defend it. Is that covered or not?

ORR: It would depend on the 8 corners in the underlying litigation against you. If the 8 corners of the - let's assume that there's coverage under the policy and to me the only issue there, I'm assuming that it would be an occurrence, that it wasn't intended that the cows and calves would escape. So we're really talking about the business pursuits exclusion.

OWEN: So you say that's an occurrence.

ORR: That would be an occurrence I would think.

OWEN: The fact that I leased it. I didn't let the cows out. I just leased it and my lessee didn't maintain the fence, or for whatever reason the fence is down. It deteriorates. And the cows and calves get out. Is that covered under your homeowners as an occurrence?

ORR: It's going to depend on how the case is alleged as to you as the person leasing. And I would harken back to the King case. The court has to look at the 8 corners from the perspective of the insured. If the allegations in the petition against you in the underlying case are similar to those alleged in King. In King the allegation was where the insureds employee beats somebody up, committed an intentional tort, but the allegations against the insured were negligent hiring, negligent supervision, negligent training, those are claims that would be within the coverage of the policy. From the insureds perspective, they're a fortuity, they're an accident. You intend to train somebody properly, you intend to hire the right people, but you made a mistake. And that's what you would have coverage for. If the allegations in your hypothetical against you by the underlying plaintiff, the person who is injured by the cows and calves are of that nature then, yes, there would be coverage.

But it could also be that the allegations of the underlying plaintiff don't bring it within coverage. We always have to go back to the 8 corners, and Allstate conceded that during their presentation. But there is a disconnect between Allstate's answer to J. Jefferson's question and the way they briefed this case. J. Jefferson asked, do we need to look outside the pleadings to rule in Allstate's favor? And Allstate's counsel said, no. I don't think you do. And yet the way they briefed it, they make reference to several matters outside of the 8 corners. The only reason they do that is because they think they have to prove up the two prongs from Pennington of continuity and a profit motive.

HECHT: I'm not clear from your brief. You think Pennington is a good rule?

ORR: I think Pennington provides a good rule. It's certainly the rule endorsed by a majority of jurisdictions.

HECHT: If you try to say Ms. Hallman's activities were a trade, occupation, or profession, that's - I sort of struggle with that. But if you try to say this was a commercial transaction, which is what Pennington also says, I struggle less with that. So if Pennington is the rule, and we can kind of expand on these three words to include that kind of concept, it seems to broaden them quite a bit.

ORR: I agree with that. The way I thought through the answer to that question is what prompted me to prepare this handout. The reason Pennington is a good rule, but it doesn't control in this case, is because Pennington arose in a very different context. Just as an initial matter, Pennington was not an 8 corners case. In Pennington, the underlying insured was sued by the plaintiff, and the plaintiff was thrown from a horse that was held by the underlying insured. That case went to trial. The plaintiff in that suit took a judgment against the underlying insured, and in exchange for an agreement not to execute on that judgment the underlying insured assigned whatever claims he had against his carrier to the underlying plaintiff. She then brought those claims, including among many others, a breach of the duty to provide a defense. So that case already - comes up in a very different factual scenario...

HECHT: But under its rule, it says a profit motive. And you say well Ms. Hallman may have been going broke. Livelihood, she may not have needed the money. Gainful employment, that wasn't her job. Earning a living, same problem. Procuring some assistance for financial gain, same problem. Commercial transaction, what is a limestone lease if it's not a commercial transaction?

ORR: But the way the business pursuit exclusion is written in Allstate's policy, it's not every commercial transaction. Let me turn to the handout and point out the difference between this case and Pennington.

OWEN: Well it says business includes trade, profession, or occupation. It doesn't say it's limited to.

ORR: I think those are limiting words. There is some case law out there that construes includes and it says that it has to be construed contextually. There are some examples of include where it's not meant to be an exclusive list. But here I think that's the proper way to read this. And one way you know that, if you turn to Tab C you see a rental exclusion. And this rental exclusion if you were to look in the record at the first volume of the clerk's record, page 54, you would see that this rental exclusion, which was not invoked by Allstate, follows in the policy immediately after the business pursuit exclusion. And the rental exclusion suggests that it would exclude any bodily injury or property damage arising out of a rental or a holding for rental.

Black Letter contract principle, we don't construe contractual provisions to be meaningless. So if you think of these as sort of concentric circles, there is going to be some overlap. Some leasing activity may indeed be a business pursuit, but not all. Otherwise, there wouldn't be a rental exclusion provision in the contract. And what differentiates this case from Pennington, in Pennington the underlying insured was a used car salesman, but he also had a side business where he was a horse breeder. And that's undisputed. That was developed in the underlying trial. And the activity at issue in Pennington was he had another horse that he and a partner bought, that they were going to try this new experimental training method on. And so the issue that was presented to the jury in the subsequent trial was, was this one-time horse experiment part of his horse breeding profession. And clearly it was a trade, profession or occupation. He admitted to the USAA, the carrier, that his horse breeding business was a business. And so the issue for the jury was, was this one-time horse experiment part of that business. Now whether or not the jury got it right, the CA concluded there was at least legally sufficient evidence to support its answer that all that was was an experiment. I think that's questionable. I think if Pennington came up, it would be a hard call for this court to make whether there was right. But the point for purposes of this case is that here you don't even get to the two-prong Pennington analysis. The reason you need the two prongs is because it clearly is a trade, profession or occupation and, yet, there still is some question in our mind but is it really a business? And the business pursuit exclusion, if you look at the litigation around the country, it usually centered on home daycares. Historically, childcare is not thought of as a business pursuit. We know that today that that's not our modern view. But there was some question in people's mind is it a business if you look after your neighbor's kids and take a nominal fee for it? And so a lot of the business pursuit cases, if the court looks at across the country, you will see it comes up in litigation a lot in that context.

If you turn to Tab B, you will see the language in a business pursuit exclusion where the litigation was an in-home childcare kind of situation. And in that policy, business is defined for purposes of the business pursuit exclusion as any full-time or part-time activity of any kind engaged in for economic gain, including the use of any part of any premises for such purposes.

J. Hecht, as a commercial transaction, arguably a one-time lease to a commercial mining company might take you within that exclusion. The court doesn't have to decide that, because that's not the language of the policy at issue.

HECHT: But Pennington says that's what it means. Pennington says here is the three words, here's the definitions, here's how you distill it down.

ORR: Pennington does distill it down, but Pennington needed to distill it down because what he was doing felt like a trade, profession or occupation. It seemed pretty clear that this guy is a horse breeder. He does it as a trade. He fits within the literal meaning of those words: trade, profession or occupation. And, yet, there still was some dispute particularly because we had been through a full trial as to whether or not this was a business pursuit. Even though he seemed to fall within the literal words. So the court needed to distill trade, profession and occupation down to sort of core elements when it's not clear from the allegation whether or not it is a trade, profession or

occupation. You always have to start with the literal words of the contract. Insurance contracts are contracts. And we should focus on the words in the contract when we're construing them.

This policy defines business to be trade, profession or occupation. And then in a subsequent exclusion, not invoked by Allstate, it talks about rental. And that suggest to me that rental and business even though they may overlap are distinct concepts. And I think that's right because I struggle the same way you did J. Hecht. It doesn't strike me...

BRISTER: So we should construe the contract based on the assumption that insurance companies never add lots of extra exclusions that overlap to make sure they don't get covered?

ORR: There are a lot of insurance policies where insurance carriers add at least...

BRISTER: Where they overlap a lot.

ORR: They overlap a lot, particularly in the pollution context. We sometimes have a very broad pollution exclusion and then we have the asbestos exclusion. Arguably those may even totally overlap. But in this policy, I don't think we have that situation. In this policy I think we have some overlap, but not total. I think some leasing activity may indeed be a business pursuit, but not this one, not on the 8 corners of the policy and the petition. And the only way that Allstate gets there to argue that this lease was a business pursuit as those words are used in the policy, is to go outside the 8 corners. And if this court goes outside the 8 corners, it will be reversing 40 years...

OWEN: But the summary judgment was on duty to defend as well as coverage.

ORR: Yes it was.

OWEN: And we aren't confined to the 8 corners on coverage.

ORR: That's true, but the CA's judgment was on duty to defend solely because that's what Ms. Hallman's summary judgment motion was as to. So as the case is presented today...

OWEN: It was very unclear to me from the briefing what we were being asked to decide frankly. You all both seem to address coverage more than duty to defend.

ORR: From our perspective, it's always been a duty to defend case. It couldn't be an indemnity case from our perspective, because at the time this was all briefed and done in the TC and in the CA, the indemnity question wasn't yet justiciable from the insured perspective.

BRISTER: No. You can get a DEC action on indemnity even before the judgment as long as the judgment is only one possible claim. If you've got covered claims and uncovered claims, and no telling which one the jury may pick, you have a point. But this wasn't that case. The neighbors had one claim: your mining company is dynamiting the ground. It was only one thing and only one

question: was that covered or not? We could decide that before the jury finds whether there's liability or not couldn't we?

ORR: The thing that makes that a little more complicated than that judge, is the fact that there were multiple defendants and Ms. Hallman was a peripheral player in what was scorched earth litigation. If you look at the 6th amended petition, Ms. Hallman and the other landowner who was sued, they were peripheral to the real - the real action was more in crushing in Meridian. The real action was the limestone mining companies. But you will see that they named a bunch of other defendants: the county, because the county allowed the trucks to drive down the roads and didn't widen the roads so that the dust and particulate matter being carted off the property wouldn't cause the plaintiffs to have sinusitis. The trucking companies themselves. You had a whole laundry list of people sued. And as to Ms. Hallman, really the issue was did she negligently lease her land to these companies?

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REBUTTAL

STACY: Even if the court finds that this really all involves an accident and an occurrence, then there is still no duty to defend or provide coverage or indemnity if the business pursuit's exclusion applies. I believe the Pennington rationale is a good one. Obviously this court is not bound by it, but it is. What the Pennington court did was say, if you go to the dictionary and you look up the words trade, occupation or profession here's what they say. And then they say we look at that, but then we also went to all the other jurisdictions and looked at how they define business pursuits. And there's three categories of how they define it. And then they said after looking at all this, this is the way we are going to define it. And the Pennington court says, it involves two elements: 1) the continuity or regularity of activity; and 2) it has to involve other things. And some of those are profit motive, procuring financial gain, a commercial transaction. And I think if you look at those and apply the Pennington analysis here, we do have a continuity or regularity of activity. We do have a profit motive, procuring financial gain, commercial transaction on behalf of Hallman.

HECHT: But it's harder don't you think, to think of this as a trade, occupation or profession?

STACY: It depends on how you define that. Again, in Pennington they said if you go to Webster here is what they say. If you go to other courts and other jurisdictions here is what they say. Here's how we define it. And I think it's a good definition. A business pursuit is a continuity or regularity of activity. You've got a profit motive, you've got some financial gain or it's a commercial transaction. That's a business pursuit. Here, if you apply that, I think just even looking at the underlying pleading, the plaintiff's pleading itself it meets all of those. Certainly you've got a continuity or regularity of activities. This went on for at least 6 years according to the pleadings, which must be accepted as true.

Ms. Hallman sought coverage under 5 different insurance policies during 5 different years. I think you have pleadings that are factual in the underlying case saying she leased this property, which means by itself it's an income from property. We asserted in our brief and as J. Owen's pointed out, this was an issue where we in the underlying action were asking for a ruling not just on duty to defend but duty to indemnify. And Ms. Hallman had given a deposition where she admitted this contractual relationship. She admitted to getting $6-15,000 a month financial gain off of it. She actually even filed her own pleading in the underlying case where she countersued for tortuous interference with this contractual relationship and said it was costing her between $6-15,000 a month that she was obtaining from that lease arrangement.

Even if you don't look at her own pleading, her own judicial admission and her own deposition, I think the facts alleged in the underlying pleading are sufficient to constitute a business activity, a business pursuit as defined under Pennington. And we do think that's a good standard for the court to adopt.

One issue that's frankly out there and that is, some of the courts have said you look at the underlying petition in a duty to defend. Some of have said you look at the underlying pleadings in a duty to defend issue. Here, we've got an issue where Ms. Hallman again filed her own counterclaim in the underlying action and made it a judicial admission that she had a contractual, commercial relationship with this other entity. They were tortuously interfering with it and she was getting all this money per month. Can the court look at that? We have this issue frankly come up on other issues and there is no real guidance. We have third party petitions for example filed against our insured. And the question is, are we limited to look at only that petition, or can we look at the plaintiff's underlying petition that sets out more facts? Frankly that's just an issue that we have very little guidance on.

SMITH: Have you paid all Ms. Hallman's defense costs?

STACY: Yes.

SMITH: Are you going to ask for any of that back?

STACY: No. And again, I think in summary, the issue now about indemnity since the underlying action was resolved in her favor, is not going to be something that we've got to go back and read to litigate. The issue of whether we - we gratuitously paid her defense costs even though we didn't think there was coverage. We hired her an attorney, we defended under a reservation of rights. For a short period of time after we got the summary judgement, we withdrew that defense. But after the CA's opinion came, we went back in and not only continued to defend her with the same lawyer, we paid all those fees.

OWEN: So the only issue in front of us is, is there coverage?

STACY: The issue is, was there an occurrence, or did the business pursuits exclusion

apply? If the court agrees with the TC and says the TC was right in finding that there is no duty to defend and no duty to indemnify, then this case will be over with.

OWEN: The duty to defend is moot because you did it, you paid, that drops out of the case?

STACY: It's moot as it relates to the issue are we going to have to now go back and her defense costs? We've already paid it. It's moot in that sense. But it's not moot in the sense that do we owe her attorney's fees...

OWEN: But you've now conceded essentially that you owed her the defense costs, so why should we send you back to the TC in a Dec action to say yes, or no you have a duty to defend, when you already paid the costs?

STACY: We have not conceded that we owed a duty to defend. We have argued all along we did not. We have gratuitously done it because...

OWEN: But you're not seeking to recover those...

STACY: We're not seeking recovery.

OWEN: So that's out of the case?

STACY: Again, if you agree with the TC the case is over with. If you agree with the CA that this was an occurrence and business pursuits does not apply, then we go back to the TC to determine attorney's fees because they will have won the declaratory judgment action.

SMITH: But when that judgment is entered, other than the fees that are going to be tacked on to it, how does that affect the legal relationship between the parties if right now you've paid all her fees and you are not going to ask for them back?

STACY: Our position is it doesn't go back to the TC. If you agree with us and agree with the TC there was never a duty to defend...

SMITH: I'm saying we disagree with that.

STACY: If you disagree and you say we're going to let the CA's opinion stand, then we go back to the TC and Hallman gets all of the attorney's fees and the declaratory judgment action. At least that's what the CA said. You have to agree with their legal principle in order to send us back to the TC on that issue.