

This is an unofficial transcript derived from video/audio recordings

Supreme Court of Texas.  
Ulico Casualty Company, Petitioner,  
v.  
Allied Pilots Association, Respondent.  
No. 06-0247.

April 11, 2007

Appearances:

Donald Colleluori, Figari & Davenport, LLP, Dallas Texas, for petitioner.

B. Dan Berryman, Kirkley & Berryman, LLP, Fort Worth, Texas, for respondent.

Before:

Chief Justice Wallace B. Jefferson, Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, Scott A. Brister, David Medina, Paul W. Green, Phil Johnson, Don R. Willett, Supreme Court Justices.

CONTENTS

ORAL ARGUMENT OF DONALD COLLELUORI ON BEHALF OF THE PETITIONER  
ORAL ARGUMENT OF B. DAN BERRYMAN ON BEHALF OF THE RESPONDENT  
REBUTTAL ARGUMENT OF DONALD COLLELUORI ON BEHALF OF PETITIONER

CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument in 06-0247 Ulico Casualty Company versus Allied Pilots Association.

COURT MARSHAL: Donald Colleluori will present argument for the petitioner. He reserves five minutes for rebuttal.

ORAL ARGUMENT OF DONALD COLLELUORI ON BEHALF OF THE PETITIONER

MR. COLLELUORI: May it please the Court. The issue in this case is the so called "Wilkinson" exception. The general rule that favor estoppel cannot be used to create coverage under an insurance policy that does not otherwise exist in the policy. The Court of Appeals in this case used Wilkinson to revive a terminated claims-made policy in thereby expand the coverage of that policy through waiver and estoppel. The Court of Appeals did this in the face of stipulations that Ulico did not control or participate in the pretense of underlying litigation called the "Allen" action and in the face of undisputed evidence from the only witness called by the Allied Pilot Associations or APA.

JUSTICE MEDINA: Wasn't-- isn't there a letter also that indicates that perhaps there's coverage for that particular action and the letter, letter was apparently rescinded and -?

MR. COLLELUORI: There, there are two letters, your Honor, that -

JUSTICE MEDINA: What impacted those two letters have on this

breach of contract?

MR. COLLELUORI: Those letters are the basis on the APA claims that a waiver or estoppel had been worked such to create coverage where the coverage does not exist under the policy. The APA's claim is not-- is that those letters constitute the waiver and estoppel that then make this claim covered under the policy even though under the undisputed terms of the policy, it was not covered and to get there, they rely on what has been called "Wilkinson" exception in Texas. Now I will advance to broad prin-- principal arguments here today. The first of which is that Wilkinson at least as it has been broadly articulated by the Court of Appeals below and by other Intermediate Court of Appeals is not and should not be the law in Texas.

CHIEF JUSTICE JEFFERSON: I think that-- I know, I know-- you'll get to that I know. How many folks have disagreed or disapproved of Wilkinson?

MR. COLLELUORI: There, there are no Intermediate Appellate Courts in Texas that have considered Wilkinson and said we will not follow that. All the, all the Intermediate Courts have followed it. They have applied it in varying ways and they have come to varying conclusions, in fact, I'll discuss later that only one court in considering Wilkinson before this case actually came to the conclusion that it apply and created coverage under the policy. However, all the Texas Intermediate Courts that have considered it or have, have look at the issue have said, "They will consider it as a potential exception to the general rule."

JUSTICE: In other States?

MR. COLLELUORI: In other States generally follow some form of an estoppel exception as well and have done so under varieties of rationales. Some State have statutes that govern, some States have limited it to simply defenses, exclusions, conditions of forfeiture as much as we will argue today this Court should. However, there is a, a, a plethora of cases out there from various states applying it and to try to find one defining theory of the-- what we call Wilkinson estoppel throughout the United States is well not impossible.

JUSTICE O'NEILL: But you wouldn't have a problem with the theory if in fact the insured was prejudiced but the insurer's conduct.

MR. COLLELUORI: We would in this regard your Honor. The first point that we would argue for today is a rule that says that Wilkinson, if estoppel is going to be used in, in Wilkinson format, that it can only be used to prevent an insurer from invoking policy defenses, exclusions, conditions of forfeiture other defenses that the insurer might raise in response to a claim that is otherwise covered by the policy.

JUSTICE O'NEILL: But now I understand your argument is you can't use waiver and estoppel to create coverage.

MR. COLLELUORI: Correct.

JUSTICE O'NEILL: But, but what if the insurer mistakenly says, "There is coverage and in fact, the insured relies on that and goes way down the road, and can demonstrate prejudice. What would be wrong with the Wilkinson?"

MR. COLLELUORI: Well, we submit couple of things. Number one that if the issue is detrimental reliance upon a misrepresentation that there are other remedies for that. There are tort remedies. There are promissory estoppel remedies. There are negligent misrepresentation remedies. None of which are involved in this case and the reason -

JUSTICE O'NEILL: But why, why wouldn't estoppel and waiver be just as good a remedy if the, if the harm you are trying to rectify is the

prejudiced to the insured.

MR. COLLELUORI: Because waiver and estoppel as this Court has recognized in the McGuire case are defensive theories. Waiver and estoppel prevent one party from asserting some right it would have or some defense it would have to the claim. Didn't-- they do not in of themselves create a cause of action. And I should point out; this is not something that is unique to insurance law in Texas. This Court has held over the years in variety of context that waiver and estoppel are defensive theories.

JUSTICE MEDINA: Is the insured here able to select his own defense counsel?

MR. COLLELUORI: Yes, it was and it did.

JUSTICE MEDINA: Is there ever a scenario where an insured selects his own defense counsel and controls the defense of an action they may be prejudiced? How would, how would they be prejudiced in a scenario like that?

MR. COLLELUORI: I cannot, your Honor, conceive of one nor have I been able to find in Texas or any other jurisdiction cases that have applied the Wilkinson type of estoppel to that scenario. In fact to the extent any cases have addressed it, they have all indicated that in fact waiver and estoppel cannot be created there because there cannot be any prejudiced and that goes basically to the underlying premise of the Wilkinson exception in the first place which that the insurer has a conflict of interest if it retains counsel and controls the defense of the insured and at the same time, could be in conducting that defense using its position as controlling the defense to prejudice the insured and, and managed itself with respect to its coverage position. The cases very rarely even come up where someone would make the argument that a counsel retained by the insured should be able to invoke Wilkinson estoppel because if lies in the face of the very first requirement in the whole premise which is that the insurer is conducting the defense and that is an extremely important point here today regardless of what Wilkinson rule the court adopts if any. As the case-- as the cases have indicated, there are three elements to Wilkinson estoppel. Control by the insurer of the defense, lack of reservation of rights, and prejudice to the insured and those first and third requirements control by the insurer and prejudiced the insured, both relate back to the underlying premise, that the insurer operating through its selected counsel has a conflict of interest. That conflict of interest is obviated when the insured has its own counsel representative and I submit that its particularly agreed just in this case in the context that we have stipulations from the APA that not only that they had their own counsel, but that through the entire course of the underlying litigation, Ulico did not participate in any way in any substantive or even procedural decision on how that defense was conducted and in no way control the defense.

JUSTICE MEDINA: Well, I guess, I guess it could be an argument that they were relying on insurance coverage. They may have defended the case in different ways.

JUSTICE MEDINA: If I ...

MR. COLLELUORI: Well, I-- there could-- I guess be that sort of argument made although -

JUSTICE MEDINA: Should have any bearing on -

MR. COLLELUORI: Number one, it doesn't necessarily have any bearing on the conflict of interest issue. Number two, it's not been made in any case that either side has been able to find. And number three, just to make sure in the testimony at trial, we got that fact

from the APA's witness, Mr. Hoffman, who was their defense lawyer in this case that there is nothing he would have done differently regardless of whether or not Ulico told he was covered or he wasn't covered. He went, he went to great pains to point out throughout his testimony and in his contemporaneous written communications with the Ulico that he was going to defend that case as he saw fit regardless of what Ulico did.

CHIEF JUSTICE JEFFERSON: Outside of this case though, if I get a letter from my insurance company saying I'm giving you the defense. I'm going to pay all your defense cost. I'm more likely to defend the case than to settle it or find some other way out. Isn't, isn't that true?

MR. COLLELUORI: Well, I guess couple of issues: Number one, if the insurer is providing the defense and then obviously you would expect the insured is going to let them provide that defense.

CHIEF JUSTICE JEFFERSON: But if they send me a letter saying pick whatever lawyer you want and I, you know, I have decided to pick the best you know lawyer in the State of Texas at the highest rate. I'm happy to do so because I know the insurance company is paying the fees.

MR. COLLELUORI: Certainly and in fact, you receive the benefit then of having the lawyer provide you with the best defense.

CHIEF JUSTICE JEFFERSON: Until five months or two years later, I, I get a letter from the insurance company that says, "Well, I told you I was going to pay your fees but it turns out there is no coverage." So now you, you are stuck with a two million dollar bill.

MR. COLLELUORI: And I guess my response to that your Honor would be, if that were that scenario, and the claim were, I would have chosen a cut rate lawyer, a cheaper lawyer to defend me if it was on my nickel then perhaps one would have a claim for promissory estoppel or negligent misrepresentation where you can show detrimental reliance damages not expectation damages. The way to address that is not to say, "Okay, we will now create coverage under the policy because the insurance company was originally mistaken in saying it was there." The question-- the answer is to allow you to sue for any damages you directly suffered in reliance on that. I would have paid \$500,000 and gotten a, a defense I was satisfied with, I thought you were paying and so I incurred a million dollars.

JUSTICE BRISTER: I understand that substituting the affirmative claim for the defensive claim when you hadn't paid yet because the chief had paid the two million dollars. All right, If you-- if the chief insured paid the two million dollars then decides there's no coverage-- sues him for the two million dollar, we would like to pay us back. How does it work there?

MR. COLLELUORI: Well, that raises a very interesting question. Obviously not one we have in, in, in this particular case where that's not the APAs claim -

JUSTICE BRISTER: Let us assume the claim would be the same. I mean you, you know, whenever you all get around to finally looking at your policy and noticed and decides this is all untimely and [inaudible] we take everything back. But it can't make any difference whether you paid it yet or haven't paid it yet.

MR. COLLELUORI: Well, ...

JUSTICE BRISTER: You're saying go somewhere else.

MR. COLLELUORI: Again, what I'm saying is that if there were a differential, if you paid more, then you otherwise would have paid then there might be a claim for that. But to simply say -

JUSTICE BRISTER: [inaudible] How do you use that? What is that?

JUSTICE BRISTER: I'm sorry a negligent misrepresentation defense -

MR. COLLELUORI: I, I think either negligent misrepresentation or promissory estoppel potentially fit the bill; however both are limited just to reliance damages which are why the APA does not want-- did not want to and did not use them in this case. Your, your question Justice Brister may also raised a broader issue that we haven't address and don't really need to address in this case which sort of a Frank's case issue on whether or not in the abstract that the insured having decided this is really the way it ought to be defended can now turn around and say, "I didn't realize I was going to have to pay for that I thought the insurance company was and I have changed my mind."

JUSTICE O'NEILL: Well, which is the key piece submitted for accounting that we-- whether you're dealing with insurance dollars or insured dollars is going to affect the dynamic of the case at the outset. If, if I'm insured and I have no coverage and I'm dealing with my dollars, I'm likely to get a more favorable settlement. If I think-- if, if the insurance company represents me that is a whole different part that affects the whole process.

MR. COLLELUORI: I understand your Honor and, and as I, as I know, a case is on rehearing and presents issue well beyond anything that we have in this case where I came prepared to discuss. My point was simply that I know that is out there. However, as it relates to our case and whether or not, we now use Wilkinson to create coverage as opposed to taking the direct route and saying, you gave me a promise that I relied upon and I get my detrimental reliance damages. The proper course is to follow the established rules or promissory estoppel and negligent misrepresentation, not to take defensive doctrines of equitable of estoppel and waiver and overrule essentially what McGuire says and create some new broad rationale to find recovery under a policy when in fact that policy never did provide coverage at all. Any questions?

JUSTICE: Thank you.

MR. COLLELUORI: Thank you.

CHIEF JUSTICE JEFFERSON: The Court is ready to hear argument from the respondent.

COURT MARSHAL: May it please the Court, Mr. Berryman will present argument for the respondent.

ORAL ARGUMENT OF B. DAN BERRYMAN ON BEHALF OF THE RESPONDENT

MR. BERRYMAN: May it please the Court. First, I would like to address Justice Medina's question of how can there, how can there be prejudice if the insured chose counsel. There can be prejudice and there was prejudice in this case even though the insured chose counsel because the insurance company told the insured that it would be paying its defense costs. Based on that, the insured provided the insurer with confidential attorney-client privilege information through its counsel that it would otherwise not have provided to the insurance company. I'll go straight to the rationale with the Wilkinson -

JUSTICE JOHNSON: But how does, but how does that prejudice the insured in this case because either the, I mean, the policy had lapsed are not seems like regardless of the exchange of confidential information.

MR. BERRYMAN: Well, the providing of confidential information in itself is prejudicial. It -

JUSTICE JOHNSON: Okay. But if you're beyond the lapsed point of

the policy, was there any information that was communicated that would bring it back within the policy? If now-- if it were in the policy, you have an exclusion or you had a reservation of rights within the policy term then you have [inaudible] situation but in this one, it seems like whatever information I gave was not going to change the dates of the reporting or the dates of the termination of the policy.

MR. BERRYMAN: There is a term in the policy that affects the dates of when notice can be provided and that is the extended reporting period provision.

JUSTICE JOHNSON: Okay, and you submitted that to the jury as I understand?

MR. BERRYMAN: Yes, your Honor.

JUSTICE JOHNSON: And that-- and that's not before the jury, that's NOV. And that's not brought up. Is that correct?

MR. BERRYMAN: Well, we, we made the point that it's a-- it was, it was just that point we achieve the jury finding that an extended reporting period was granted under the policy. The trial court disregarded that. The Court of Appeals did not address that point.

JUSTICE JOHNSON: Did you have, did you have that before the Court of Appeals?

MR. BERRYMAN: Yes your Honor.

JUSTICE JOHNSON: Okay.

MR. BERRYMAN: We're raising it again here, in our briefing. You'll notice in front and center that we believe that the trial court erred in disregarding the extended reporting period.

JUSTICE JOHNSON: I noticed that in your briefing but I, I didn't-- the Court of Appeals' opinion seems to say that cross points did not include one on the NOV.

MR. BERRYMAN: It did.

JUSTICE JOHNSON: Okay.

MR. BERRYMAN: It did, and there is full briefing you'll notice both ways. Both the APA briefed that issue and you'll notice that Ulico briefed the issue in full and responds at the Court of Appeals level.

JUSTICE JOHNSON: What testimony was there? The Court of Appeals opinion said that APA was denied. They said two prejudices. The APA was denied the opportunity to negotiate for an extension of coverage. Was there a testimony about that?

MR. BERRYMAN: That it was denied-- oh, yes your Honor, there was testimony to that effect from Steve Hoffman's Counsel for the APA. Mr. Hoffman testified that-- and just a step back. Even though it's the APA's position and continues to be the APA's position that an extended reporting period was requested and was granted. Mr. Hoffman's testimony was that the extended reporting period would have been more formally requested right out front if Ulico had told the APA early on when it had information on this notice defense. That it was either going to reserve its rights to the notice defense or that it was just going to deny the claim as to the notice defense and so yes, your Honor, there was testimony on that point.

JUSTICE: Was there testimony as to whether Ulico or any other insurer would grant an extended reporting period to recover a claim that had in all respect?

MR. BERRYMAN: Was there any testimony as to why Ulico would do that?

JUSTICE: Whether -

MR. BERRYMAN: As to whether, as to whether an extended reporting period was granted?

JUSTICE: As to whether one would be granted if the company knew

that the claim had already been made. Was, was there any evidence why an insurer would gratuitously extend the reporting period to cover claim that already been made and was not timely?

MR. BERRYMAN: Absolutely. Yes your Honor. There was a, there was a, a, a I, I can't remember the fellow's name but he was from [inaudible] Brothers. He was brought in as an expert in the, in the insurance industry -

JUSTICE: Jeffrey Shannon.

MR. BERRYMAN: Yes your Honor, Jeffrey Shannon and Mr. Shannon testified that it was customary in his view that often insurers will grant extended reporting periods in order to maintain customer relations with their insureds. You may wonder -

JUSTICE BRISTER: Mr. Shannon how can that-- wouldn't do that with his own money. Especially if it's big claim, right?

MR. BERRYMAN: Who knows?

JUSTICE BRISTER: I mean we can take judicial notice that insurance company would be foolish to grant an extension for a huge claim so that we could pay our policyholders investors money out on this claim.

MR. BERRYMAN: Well, it's interesting that, that Justice Brister you'd say that because and I would-- I certainly understand your point that it would be -

JUSTICE BRISTER: Would you do it with your money?

MR. BERRYMAN: No your Honor. I certainly would not.

JUSTICE BRISTER: Then would they either?

MR. BERRYMAN: But the, the letters from Ms. Bowers came before Ulico received the, the bills and the testimony in this case was that was, that was pretty much how the process went whenever the APA's counsel had dealt with Ulico in the past that the bills would be submitted at the end. So Ms. Bowers' letters came to the APA in March of 2000 and April of 2001. Then they receive the bills in May of 2001 to the tune of approximately \$ 600,000 and then started looking little bit deeper in the file to see if they can come up with a coverage defense and oh the found the notice and here -

JUSTICE BRISTER: That's consistent with Mr. Shannon's testimony. The client, client relations might cover a small claim but not a \$ 600,000.

MR. BERRYMAN: I, I think that is consistent with Mr. Shannon's testimony.

JUSTICE BRISTER: What about opposing counsels, why can't you bring this as a negligent misrepresentation claim? Why do we need to mess up the McGuire rule?

MR. BERRYMAN: I think this is different from negligent misrepresentation and he also mentioned promissory estoppel. I think it's different from both of those causes of action.

JUSTICE BRISTER: [inaudible] I'm not-- never sure what promissory estoppel is?

MR. BERRYMAN: Me, me neither.

JUSTICE BRISTER: Negligent misrepresentation I'm fairly clear on that.

MR. BERRYMAN: I'll stick with negligent misrepresentation. I would say that there is a big difference here between the negligent misrepresentation claim in this type of a claim because negligent misrepresentation, negligent misrepresentation claim tends to focus on one representation or series of misrepresentations that have been made by one party to another. Here we have more than that. We have representations that were made plus a policy and I think that makes a difference here that would distinguish this case from negligent

misrepresentation.

JUSTICE MEDINA: But, but the policy, the policy had lapsed. See, you take that out of the equation and just leave you with one cause of action if any.

MR. BERRYMAN: I would say that this policy had not lapsed entirely your Honor, your Honor because of the extended reporting period provision. This policy specifically said that if that they contemplated the circumstance where the insured would terminate or the client accept renewal of the policy -

JUSTICE MEDINA: Is the claims made policy with a tail on?

MR. BERRYMAN: It's a claim made policy with an extended reporting period provision. Some people referred to as a tail and this tail provisions can take different forms. The policy-- the term in this particular policy said that, "If the insured terminates the policy or declines to accept renewal of the policy, then the insurer can grant the insured more time to report its claim." It doesn't say how that would be granted. It doesn't say how it would be requested and didn't purport to require any additional consideration.

JUSTICE MEDINA: Would, would it matter if there is a long history with this particular insured and insurer and the claims being made after the tail expired and those claims being covered? We will take this on case-by-case basis.

MR. BERRYMAN: I'm not-- I think it would be taken on a case-by-case basis. I'm not sure that it would matter the sequence of events that led up the point in time and what the policy said at that particular point in time.

JUSTICE JOHNSON: As I understand, your client had purchased a new policy and had a new policy in effect.

MR. BERRYMAN: Yes you're Honor.

JUSTICE JOHNSON: At that time it forwarded the suit papers and notice back to Ulico?

MR. BERRYMAN: Yes you're Honor.

JUSTICE JOHNSON: So it had already moved to another insurer but paid their premiums. The new one it is the policy he left I would presumed or knew when the policy-- because you have extended twice. So now, is there testimony going back to Justice Hecht question, is there testimony that an insurance company such as Ulico face with a suit or 18 to 62 million dollars against a former insured, who already moved his policy? Was there any testimony under these circumstances Ulico would have agreed, Ulico itself would have agreed?

MR. BERRYMAN: I don't know that there is specific testimony but there is certainly evidence why Ulico would, would grant more time to the APA and that circumstance were reported its claim I think the it ought to be kept in mind that these-- even though the APA had moved on to another insurance carrier legion, this policy extended just the one year policies and secondly, Ulico who had had, I don't recall how long the relationship had been between Ulico and APA in the past, however, Ulico is an insurance company that is specifically designed for insuring unions and so I can certainly see a circumstance where Ulico would like to maintain the relationship with this particular union even though the union for the following year was going to have its insurance through another carrier.

JUSTICE HECHT: If the theory underlying Wilkinson is that and insured would be prejudiced by revealing information to counsel that goes to a coverage issue that the insurer can then take advantage of and that shouldn't allow that to happen. That didn't occur here, did it?



MR. BERRYMAN: There was certainly some information that was provided that could have been used but there was no evidence in the record your Honor that, that it was used.

JUSTICE HECHT: Well, how, how could have been used?

MR. BERRYMAN: There was some-- I believe there was some briefing or analysis with respect to the fact the Allied Pilots Association did not represent the Reno Pilots in the underlying Allen case and that, and that information appeared as I pointed out in the brief and Ulico's first amended petition or first amended answer in this case. It was on the same subject matter, whether they use the information, I don't know.

CHIEF JUSTICE JEFFERSON: If that second letter from the adjuster Ms. Bowers -

MR. BERRYMAN: Ms. Bowers.

CHIEF JUSTICE JEFFERSON: Ms. Bowers had contain a reservation of rights letter, you wouldn't contest their assertion of non-coverage, is that correct?

MR. BERRYMAN: If they had contained a reservation of rights specifically as to the notice -

CHIEF JUSTICE JEFFERSON: The same as the, the same as the first letter.

MR. BERRYMAN: The second letter was the same as the first letter?

CHIEF JUSTICE JEFFERSON: Yes.

MR. BERRYMAN: Is that what you're saying?

CHIEF JUSTICE JEFFERSON: If it, if it going to continue-- continuous reservation of rights then they would be entitled to certain non-coverage because the policy expired. And I understand that your argument that it was extended putting that aside.

MR. BERRYMAN: I think that even if the second letter had reservation of rights language genets similar to the first, I think that the APA would still have a claim for waiver and estoppel.

CHIEF JUSTICE JEFFERSON: Why?

MR. BERRYMAN: Because the first reservation of rights letter made absolutely no mentioned of the notice defense. It elicited certain defenses very specifically but it didn't say one word about a potential notice defense and what this reservation of rights letter supposed to be.

CHIEF JUSTICE JEFFERSON: I thought I have kind of a mother hovered -

MR. BERRYMAN: It, it did. It had some supposed catch all language at the end, which is perhaps designed to catch to bring in anything else that they could possibly think of but I read that language. I believe it's the last two paragraphs so the letter is being more forward looking if, if, if more information comes in, we may change our minds. I think the first sentence of the second to the last paragraph of that letter talks about our coverage position as based on the information that we have for this point in time and then from thereon I read the rest of it based on that.

CHIEF JUSTICE JEFFERSON: Well, there is very broad -

MR. BERRYMAN: [inaudible]

CHIEF JUSTICE JEFFERSON: - [inaudible] reserve our rights under the policy and available at all to deny coverage and rescind the policy or additional alternative basis as etc., etc., just like lawyers do -

MR. BERRYMAN: Yes your Honor and I read that in light of the paragraph before it which talks about we were making this coverage determination based on the information that we have to this point which at that point Ulico had all the information it needed to deny the claim

based on a notice defense. So -

JUSTICE HECHT: But now if the theory that support Wilkinson doesn't apply here then why should we apply the estoppel rule? I ask you whether the theory was that information communicated that would then prejudice the insured because his-- the insurer cannot take advantage of information that it learned in defending him to say there is no coverage. They said that didn't occur here, so then why should estoppel apply here?

MR. BERRYMAN: Well, I'm not sure that analysis needs to include whether the information was actually usable or used against the insured. None of the cases I've seen have, have tried to make that-- have looked at it that closely. They have looked at it along the lines of the insured provided information or was actually the insurer put itself in any position by assuming the defense that allow it to receive more information that it would have received otherwise while it had a coverage defense that it was not revealing to the insured and that's the problem. That it is putting in itself in a, in a better position to receive information. Now whether that information is actually usable or actually used against the insured, I'm not seeing any analysis to the effect and I don't -

JUSTICE O'NEILL: Is the standard potential for conflict as opposed to actual conflict?

MR. BERRYMAN: I believe the way it's stated it is actually apparent conflict of interest, actual or potential conflict of interest, the way I've read the cases.

JUSTICE HECHT: How can there be potential conflict when the insured has his own lawyer?

MR. BERRYMAN: I think the potential conflict is that on the one hand, the insurance company is suppose to provide a defense even if it's paying the insured's lawyer, it suppose to provide the defense do something for the insurer; while on the other hand, if it has a coverage defense that it's not advised that is insured about. There can be, it still has right collect the information even if it's paying the insured's lawyer like in this case, there is an information -

JUSTICE BRISTER: Well, this, this is from the secret defense that you all put on to discover to. The fact was that neither side looked at the policy that they would claim. Well, it wasn't something that your client could have picked up the same file and looked.

MR. BERRYMAN: Certainly and, and Ulico I think made an argument to that effect that will, why shouldn't the insured have known about this late notice defense? Well, I think given that you have an extended reporting period provision in this policy that allows the insurer to grant more time to the insured, the APA was entitled to wait and see what the insurer was going to say about it and they did wait and they heard what the insured said, what insured said about it, what the insured said about it is, "We got you covered. We will pay your defense cost." And then they said it again in another letter and so I think the APA was perfectly justified in waiting and then listening to what the insurer had to say and then relying on that. The Court had noticed that I included with the handout I provided a case that I think has the best analysis of the Wilkinson exception that I've seen and a very thorough analysis of waiver and estoppel in the insurance context in general. And regardless of which way this Court decides to go on this issue, it is a very informative case. It's a, it's a very carefully thought out analysis. The case is Denison Custom Homes versus Assurance Company of America, Judge John Rainey US District Court Southern District of Texas, Victoria. It also happens to be the most recent case that cited

Wilkinson and I'll just get through the case briefly but it actually was a summary judgment ended up with a summary judgment being granted for the insurance company and the facts briefly is that a home builder was sued by one of its home purchaser for defects, defects in a, in a house were built, a notice of claim was provided to Assurance and Assurance was the insurance company -

JUSTICE: Which is significant part of the case it helps your cause?

MR. BERRYMAN: I believe the analysis in general of the case and the statement of the Wilkinson exception elements, I think confirms our reading of what the Wilkinson exception elements ought to be.

JUSTICE JOHNSON: Claims made policy?

MR. BERRYMAN: No, your Honor. It was not. It was in fact one of the distinguishing features in this case that cause the court to grant the summary judgment motion was that the policy was a builder risk policy which contain no duty to defend whatsoever and the Court -

JUSTICE JOHNSON: But it was an occurrence policy with an occurrence during the policy term?

MR. BERRYMAN: Yes, your Honor but there was no duty to defend on the issue was whether the insurance company was on the hook for, for the duty to defend here and the court found that it was not because it could not waive a provision that was never in the policy in the first place and the, the, the analysis is really too much for me to go into here but it made a lot of unique points I would say that I've never seen in any case, one of which make a distinction between waiver and estoppel. The Court first look at the Wilkinson exception as it's put together now. I see I'm out of time, so I'll stop talking unless there is any further question.

CHIEF JUSTICE JEFFERSON: No question. Thank you.

MR. BERRYMAN: Thank you your Honor.

JUSTICE BRISTER: Coming back to your negligent misrepresentation, if they have sued you for negligent misrepresentation, your defense would have been that they were not reasonable to rely since they had policy in hand and would have known the State is right.

REBUTTAL ARGUMENT OF DONALD COLLELUORI ON BEHALF OF PETITIONER

MR. COLLELUORI: I'm sure that would have been one of the disputed facts that they try to [inaudible]

JUSTICE BRISTER: Not, not a disputed fact that they had the policy in hand and could have read it.

MR. COLLELUORI: And that's true, your Honor.

JUSTICE BRISTER: So really negligent misrepresentation and promissory estoppel are not going to be available if the cases-- when there's a notes claimed?

MR. COLLELUORI: Well, whether they would be successful in this particular case when the particular problem is a lapsed date that could have been seen by the insured that could have been seen by the insurer, the Court may well be right. We may well prevail on that. However, in looking at whether or not, just the abstract promise we will pay your defense costs when they aren't really covered by the policy, I think is a different issue. Every case would stand on its own.

JUSTICE MEDINA: We accept opposing counsel seems to argue that there's more to it than just looking at the date of the occurrence and

the date the policy expired. There is some tail or some extension on his policy that creates perhaps in our mind an ambiguity.

MR. COLLELUORI: Well, it is interesting your Honor. There are several points I'd like to make about that. First is that you will find nothing in the record from the two witnesses, one from Ulico and one from the APA. Mr. Hoffman about a request or a granting of an extended reporting period. There is a provision in the policy that would allow for an extended reporting period to be granted under one of the two circumstances and the policy is very clear that if Ulico terminated the insured then they had to provide upon request in an specified price the extended reporting period. However, if the insured terminated which is what occurred here or failed to renew more accurately then it was completely discretionary whether Ulico wanted to grant a new an extended reporting period upon request. There was no request made. There was no granting of an extended reporting period and there were certainly no consideration for it and the APA's argument is well we wouldn't need consideration because it said; you could grant it if you wanted. Obviously, it would still be a modification of the lapsed date of the contract and therefore, it would require consideration. It would in effect be a new contract since the contract had terminated and no request for an extended reporting period had been made. The APA has to try to walk a tight rope here before this Court because the Court of Appeals said, "Your prejudice can be found, and that you didn't get a chance get an extended reporting period." They are still trying to preserve the finding that the trial court JNOV that they did get an extended reporting period which obviously would mean the Court of Appeals was wrong on how it evaluated prejudice. If I could very briefly just address the other prejudice argument that the APA wishes to assert that they gave up some sort of privilege information. I think Justice Hecht's question is exactly right. There is no evidence that it was used to the detriment. Frankly, there is, there is the minutest amount of anything that is even argued with privilege that was provided to Ulico and it was provided only after all the defense costs that they are suing for had been incurred in this case after they'd filed the motion for summary judgment and some two years down the road. And what Mr. Hoffman did was he provided the APA-- the Ulico finally with the bills and the briefing that he had done, all of which laid out the issues that the APA was arguing as a matter of public record and, and perhaps the only thing one could find in Mr. Hoffman's submission that would arguably be privileged was his statement that we filed a motion for summary judgment. We think it's about a fifty-fifty shot.

JUSTICE: Are the bills were in the record?

MR. COLLELUORI: Bills were in the record.

JUSTICE: They are in the record here.

MR. COLLELUORI: Yes, they are.

JUSTICE MEDINA: There seems to be some issue that perhaps the insured is in an equal position to determine the coverage as the insurer. I think the insurer is in the better position to determine coverage and give the insured a decision as to whether or not a claim is covered or not.

MR. COLLELUORI: We think both parties were in a position to do it. Ulico obviously did not do it correctly. Whether the APA was cognizant of the problem or not, I submit circumstantially the evidence is they were -

JUSTICE MEDINA: Does it matter?

MR. COLLELUORI: It, it didn't matter to the jury obviously and for purposes of the Wilkinson exception, the points were arguing, it really

doesn't matter because the question still comes back to, we didn't take the defense on. They represented themselves and they cannot have a, a Wilkinson exception under sort of circumstances.

JUSTICE WAINWRIGHT: With regard to extension of the reporting period, what were the arguments made on which the jury based its finding that the, the reporting period was extended? What-- were the arguments that the parties pursuant to the provision of the contract that you explained extended it? Or were the arguments to the jury that independent of the contract separate and aside from it that statements and conduct created an agreement to extend the reporting period?

MR. COLLELUORI: Your Honor I confessed the jury arguments not having been transcribed, I couldn't quote you what the APAs Counsel argued. I will say that generally speaking throughout the trial and throughout the appeal, the APA has argued that by acts of conduct that Ulico either was effectually granting an extended reporting period even though nobody use those words or that they were entered into like separate contract wholly independent of the policy, in fact, they submitted both of those as jury questions. Those are questions one and two that the jury found yes. What exactly they argued, the jury argument on why they should prevail on that and what the jury relied upon? I don't know obviously and, and the jury found against us on all four liability questions, two of which was [inaudible].

CHIEF JUSTICE JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted. That conclude the argument for this morning and the marshal will adjourn the Court.

COURT MARSHAL: All rise. Hear ye, hear ye, hear ye. The Honorable Supreme Court of Texas now stands adjourned.

2007 WL 5321665 (Tex.)