ORAL ARGUMENT – 10/10/01
00-1152
KING V. DALLAS FIRE INS. CO.

WOTRING: Carlyle King is seeking insurance coverage for claims that he negligently hired, trained and supervised one of his employees, Carlos Lopez, who was involved in an altercation with another man named Greg Jankowiak.

Mr. King is asking this court to reverse the CA's holding that imputed Mr. Lopez's allegedly wrongful intent to Mr. King to deprive him of his insurance coverage under his commercial general liability policy.

The CA hinted in this case the first error that it made was in failing to use the appropriate test for determining whether an event is an accident. This court has looked at the term "accident" in insurance policy cases over the years in cases involving life insurance. Those cases start out with the Hutcheson(?) case...

HANKINSON: Why aren't those cases applicable to a liability policy?

LAWYER: Because they interpret the term "accident". Those are the only cases...

HANKINSON: But in a very different context.

LAWYER: It is true that they are in the life insurance context. However, they are looking at what it means to have an event that is an accident or is not an accident.

HANKINSON: Then why aren't we looking instead at the Cowan case, which addresses the question of accident in the context of a liability policy?

LAWYER: And indeed the Cowan case is in a commercial liability policy. And it looks at the Hayward case and the Hutcheson(?) line of cases for guidance on what it means to be an accident. The Trinity case does not address the exact issues that this case presents. Because in the Trinity case, Mr. Gage who was involved in the dissemination of pictures that got back to the woman in the pictures, was the actual person seeking insurance coverage.

In this case, by analogy it would be as if Mr. Lopez was seeking coverage. In this case it's not Mr. Lopez seeking coverage. It is Carlyle King seeking coverage for direct negligence claims against him. Claims that his own conduct failed in failing to get a background check, in failing to adequately supervise Carlos Lopez, that that's what caused the altercation between Mr. Lopez and Mr. Jankowiak.

HANKINSON: But aren't you really taking the position that that in fact is the occurrence for

purposes of the policy as opposed to the actual physical conduct that occurred that caused the injury? Isn't that what you have to do?

LAWYER: We are taking the position that the occurrence in this case is the failure to do the background check, the failure to supervise Mr. Lopez adequately or reasonably as alleged that led to the altercation between Mr. Lopez and Mr. Jankowiak.

HANKINSON: So you're taking the position that for purposes of your client's claim for club coverage, the occurrence is not the altercation but the occurrence was the negligent hiring and at the point and time when that occurred?

LAWYER: That's correct. And that's what is in the pleading that was asserted against Mr. King.

HANKINSON: Do you have any authority for the fact that under those circumstances when you have something like this where you have direct liability claims being made against two insurers for different activity, that in fact anything but the actual injury event is the occurrence? Typically we think of the occurrence as being the car wreck, fight, the whatever, the actual event when the harm occurred.

LAWYER: In any case involving a negligent hiring or negligent training or negligent supervision, the occurrence would be broadly defined as those...

HANKINSON: Then my question to you is, do you have any authority from Texas or in any other jurisdiction or secondary materials on insurance law in which an occurrence under an insurance policy has ever determined to be anything except the event, meaning the injury itself?

LAWYER: To directly answer the court's question, I believe there is some secondary authority in the briefing, the couch(?) on insurance. It may not phrase it exactly that way. And I believe Appleman, also cited in the briefing, stands for the proposition that when you have this type of negligent hiring or a claim against an employer for what the employee has done, that you would look at it broadly from the occurrence, including the claims about negligent hiring, negligent supervision and that you would broadly define the occurrence to meet that.

HANKINSON: Are there any courts that have adopted that view as opposed to - I mean basically you're saying there are two occurrences here, two separate occurrences.

LAWYER: I would phrase it a little bit different. I think the occurrence is broadly defined as one big occurrence, which was the hiring, the failing to supervise that later led to the altercation. As for authorities that supports Carlyle King's position those are also included in the briefing.

HANKINSON: But in terms of the specific question about occurrence. That's what I am trying to focus the authority that you've cited. Is there anything that goes to your view of how we

would look at occurrence when in fact we're looking at two separate courses of conduct that led to the injury?

LAWYER: I'm not aware of any case that would say exactly that. I think you can look at the cases that imply the separation of insurance, and that's in effect what they are doing. Those would be the Silverball Amusement case, and some of the other cases talking about the separation of insurers. But particularly that language.

HANKINSON: Isn't it really the case then that in fact for us to adopt your view of occurrence we really have to look at the separation of insureds provision of the policy in order to go back to occurrence and look at it in the way that you want us to?

LAWYER: I don't believe that's true. I believe that the term "accident", as this term has applied it in those life insurance cases, requires the court to look at the events from somebody's viewpoint. And that the viewpoint that the court said you should adopt in determining whether an event or a series of events is an accident, is the viewpoint of the insurer.

ENOCH: Appleman uses that rationale. Now the occurrence is viewed from the insurer's point of view as to whether it was an intended event or an accident. But Trinity Universal makes the specific reference to the fact that the policy, like the policy here, has deleted language dealing with the view of the insured and dropped it down to the exclusion for intentional conduct. And so Trinity really is predicated on the notion that you don't look at the accident view from the insured. And so, doesn't that pose a unique circumstance for your argument?

LAWYER: Certainly that language from Trinity is intentioned. But I think the language from that paragraph - Trinity's intention with the rest of what this court says in Trinity itself.

ENOCH: Well that may be, but they're only dealing with one actor. They weren't dealing with the separation of insurers. But it plays a more significant role in the separation of insurers.

LAWYER: That's exactly right. That language comes when this court is responding to the CA's argument in Trinity, and to Gage's argument that I never intended these photographs to get back to the woman who is in them. The way I read that paragraph to be consistent with the rest of this court's language in Trinity is that this court is saying you don't look at it from the subjective standpoint. And we know that because it's when viewed from the standpoint of the insured language _____ outside is no longer part of the occurrence definition.

That language has been used by Dallas Fire in this case to support a broad proposition that intentional conduct takes an event or series of events outside of an accident. Certainly, that's the same argument that this court rejected in Trinity itself. In Trinity this court said that we're going to reject the argument that if an actor intended to engage in the conduct that gave rise to the injury, there can be no accident. This court said no, that's not what we think is the

appropriate definition of accident. And the reason that we think t hat's not appropriate is because it makes the intentional exclusion irrelevant and because it defeats the normal expectation of the insureds. And the court went on in Trinity to provide a couple of examples of intentional conduct that it felt would be covered by an accident policy. It talks in Trinity about the example of the deerhunter: if you intend to shoot at the bushes and you think you're hitting a deer, and you actually hit a person, that's still something that the court felt should be covered, and it was an example that the court itself provided. And it follows up on an earlier example that this court provided in the Hayward case having to do with your walking on the side of the road, and you're run down by somebody. That's an event that should be covered regardless of whether the person didn't intend to run you down or whether they did intend to run you down.

So certainly the proposition that you can take that isolated paragraph out of Trinity and hold it up and say that means that as the CA said, an occurrence that is not the result of an intentional act and which could not reasonably have been anticipated by causing the occurrence is an accident. But the CA's definition of an accident is simply irreconcilable with what this court said in Trinity.

ENOCH: Now going back to your comment about the authorities that are here. As I look at them, it really seems that there is actually a subset within the authorities dealing with a particular allegation - negligence hiring verses some other allegation. Appleman sort of acknowledges that this separation of insured, this whole notion that's out there is something the courts really haven't looked at when it's talking about issues other than negligent hiring. The treatise seems to acknowledge that if negligent hiring is the specific allegation, he doesn't have as much complaint about the court's failure to study this coverage viewed from the insured's point of view. It doesn't seem to say that that exception is a particular problem in negligent hiring. And then if you look at the authorities out there, it seems that most of the authorities that say that the occurrence is the critical question and the occurrence was the result of intentional conduct, therefore, there is no claim for negligent hiring, no coverage for negligent hiring, it seems to be one set of cases that seem to be fairly uniform. And it's only when you get to a parent responsible for a child's intentional conduct, or for some other special relationship that _____ out there where they court seemed to split is to whether there is coverage or not.

LAWYER: One theme in the case is what is an accident and how do we go about defining what an accident is? The other is, what do we do about these cases interpreting Texas law in which the courts have said, the employer is imputed with the intent of the employee. And that seems to come up in the separation of insureds in the negligent hiring context.

I think the idea that you impute the employee's intent to the employer in these coverage cases is inconsistent with what this court has done say when the husband burns down the house. You don't impute the husband's intent to the wife to deprive her of coverage. And likewise, if we were talking about a liability issue, you would not...

ENOCH: That was a point I made inarticulately. Our court doesn't impute intent in a

husband/wife or a parent/child, but the court does in negligent hiring cases. And it's not really imputing the intent.

LAWYER: In those cases in which have imputed the intent are done only in employer/employee context. I see no reason to do that. I don't think that is consistent again with what you do in the matrimonial cases in which you have the husband burning down the house and the wife attempting to get the insurance proceeds. If what you're worried about is collusion or conspiracy, you would have a larger opportunity for that type of collusion or conspiracy in the matrimonial cases than you do in employer/employee relationship cases.

HECHT: Do you think Fiesta Mart was wrongly decided?

LAWYER: Yes, I do believe that Fiesta Mart was wrongly decided. I think we are taking issue with the line of 5th circuit cases which have gone the other way on this.

HECHT: It's one thing to say, well the trucking company's driver pulled into somebody when it shouldn't have, and, therefore, the trucking company was also negligent for entrusting the vehicle and hiring an _____ in the first place. And saying, that's covered, that's clearly covered, but if he gets made at somebody who is honking at him and he runs into them, then that wouldn't be covered. That seems to be a fairly difficult distinction to draw. But then way over here on the other side where you have fraud cases and sexual abuse cases, they seem to be a lot different from the driver's cases.

LAWYER: The difference I think has to go with the underlying cause of action. We're more comfortable saying in the negligent driving cases that we didn't train our drivers when he ran out and backed into somebody. We're less comfortable in negligent hiring cases saying, well we didn't train him and he went out and he engaged in some sexual harassment or some intentional fraud. I don't think that the comfortableness that you have in extending negligent hiring to those intentional torts for the employer should be spilled over into the coverage dispute, because they are two different issues. In both cases what you have from the insured's perspective is an accident. Nobody's arguing in this case that Mr. King intended his employee to go out and beat up a man. But on the same token, I think this court would be uncomfortable or less comfortable applying negligent hiring to cases in which you have the employee go out and do an intentional tort.

The coverage issue still follows the analysis - what is an accident? what is the triggering mechanism for coverage? and that shouldn't depend upon the nature of what the employee did down below. In the underlying suit it may very well be that there would be a summary judgment or a more appropriate mechanism for getting rid of those cases quicker and sooner than these other cases in which you have a negligence of the employee.

JEFFERSON: But here the question of coverage would never arise if the tort didn't occur. In other words, had there just been an act of negligent hiring, but no consequence afterwards, then we don't even have to reach the issue at all. The lower court wouldn't, and we wouldn't on a

coverage dispute. Here the only reason that we have the case is because there's a combination the 5th circuit called it interdependent and related. There is no way that we would have this issue but for the two things: the hiring; and then the tort.

LAWYER: Certainly the separation of insured's cases and the cases cited in the brief support doing that in effect. They don't use the same line of analysis that Justice Hankinson discussed. I do think that one other statement that needs to be made is this is not a case that depends upon an intentional tort. If Mr. Lopez had negligently gotten out of his BobCat and fallen on the guy, we would still have the case. It's the underlying tort that is important.

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HOLLINGSWORTH: I am here today on behalf of De Soto Lake and Tarrant Baptist Associations. As we stated in our briefs, these associations represent approximately 300 churches and missions across the state. And we are here today in support of Carlyle King.

I am just going to address two quick issues. First, how other jurisdictions have applied the separation of the insured's provision in occurrence based policies; and, second, how this court's opinion in the case today could have detrimental effects upon churches, not only my client's but other charitable organizations across the states.

ENOCH: Would you focus on those cases specifically dealing with negligent hiring as opposed to either sexual abuse or some of the other cases.

HOLLINGSWORTH: What we have essentially found is that there are five cases that deal with separation of insured provisions in occurrence based policies with the same exact definition we have here involving some type of negligent hiring, supervision or training. Now it may not be hiring. It could be supervision of another individual that does involve an assault. But essentially the underlying claim is, a direct liability claim for some type of negligence supervision, training or hiring.

Of those 5 cases, 4 of them have determined that the separation of insured's provision does apply in looking at what an occurrence is. They simply say that the provision requires us to look at it from the standpoint of the insurer. The one case that does not do that is a 5th circuit case interpreting Mississippi law. And frankly, that case doesn't discuss why the separation of insured's provision shouldn't be used in looking at an occurrence. Rather it relies on some older cases involving the related to an interdependent language. There is no indication in the record of those cases that the separation of insured's provision was even part of by the consideration of the court.

Essentially, the courts that have applied the separation of insured's provision have determined that there are two injury causing events. That's exactly how they look at it. They look at it in terms of the employer's actions, negligence and training, supervision or hiring. And then

they look at the intentional acts of the tort-feasor. And they do not impute the intentional acts of the tort-feasor.

What the insurance companies in this case are asking the court to do, and they blatantly said it in their briefs, is that the negligent hiring and training isn't the proximate cause of the injuries in this case. But that is basically an impermissible request because this courts already recognized that in certain cases negligent hiring can be the proximate cause. That it in fact is a recoverable injury under a negligence theory.

What the insurance companies have tried to do is make this direct liability claim into a derivative claim. But it's not. In a case that we have not cited in any of the briefs, and we would be happy to submit the cite to the court, is Young v. The City of Demit. This court dealt with a situation in a hearing that was somewhat similar. A governmental agency was being sued on a theory of negligent hiring of an officer that had intentionally driven his car into a group of people.

Under the Texas Tort Claims Act you cannot sue for intentional acts. The government in that case asserted that they should be allowed to be imputed with the intentional acts of the government actor in order to avoid liability under the Texas Tort Claims Act. What the court came back and said without reference to whether the Texas Tort Claims Act was applicable, they did say though you should not impute that knowledge of the intentional act by the actor to get outside of coverage by the Texas Tort Claims Act.

HECHT: The opposing amici say that if that's the case that if that's the case, you can always at least state a claim against an employer for negligence in putting an intentionally acting employee in those circumstances. So there would always be at least a duty to defend if not coverage. What's your response to that?

HOLLINGSWORTH: When you look at the allegations in this petition there are no allegations of intent against the employer.

HECHT: No. I'm saying it would happen in every case. It would be an inept lawyer who couldn't state a negligence claim against an employer who puts someone in a position to do a wrongful, intentional act.

HOLLINGSWORTH: Certainly, I believe there would be coverage in those cases.

HECHT: So we're fighting over all the marbles here, whether it would always cover or not always cover?

HOLLINGSWORTH: I certainly agree, and I think it would be involving cases that extend beyond intentional acts that were caused by insureds.

ENOCH: But there is a limitations though that the negligent hiring always presupposes

that you had reason to know of a particular _____. Negligent hiring isn't an automatic just because an action occurred. Negligence hiring would be because of the driving record of the driver, or it could be because of the criminal record of the driver, or it could be something that existed before they were hired that a person with a _____ position hiring would not have hired or put them in the position knowing what they knew. There's a threshold element before the duty about negligent hiring gets breached.

HOLLINGSWORTH: That's correct. And if the facts are alleged in the petition that the acts have occurred, then that's what the court has to look at in determining coverage. That's what this court has told us.

HECHT: Well not coverage, just the duty to defend.

HOLLINGSWORTH: That's correct. Irrespective of the truth or falsity of those allegations, that's what the court has to look at in determining coverage.

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RESPONDENT

TIGNER: I think there are 6 reasons why this court should affirm the TC and the CA, and hold that negligent hiring, training, supervision claims are not occurrences to an employer when the employee commits an intentional act.

The first reason is stare decisis based upon opinions out of this court. The first line of cases is the Argonaut v. Maupin, the Cowan case, the Mid-Century case, which defined what an accident is. Here, we're dealing with a vicious assault. Secondly, the Griffin and McManus cases out of this court, which held...

HANKINSON: The first set of cases that you just talked about, none of them involve an allegation against two insureds who engaged in separate injury producing conduct. But we haven't ever addressed this particular point have we?

TIGNER: No.

O'NEILL: So that takes care of stare decisis?

TIGNER: Not really. When we get into discussing the separation of insureds, I think I can explain how you would somewhat erode or have to create an exception to those cases to get where petitioner would like to get.

The third case from this court is National Union v. Merchants case, which held that this court looks at the origin of the damages.

The fourth line of cases is the Doe v. Greater Dallas Boys Club, which holds that you look for the but for cause in determining the injury.

The second reason is the potential increase in moral hazard as this court explained in Cowan when it discussed the Abraham article.

The third reason is the potential for increase in insurance rates as explained in Commercial Union v. Roberts, which is not an opinion from this court. It's an opinion from the Western District in the federal system.

O'NEILL: Or a potential for a windfall as they have claimed. There are two ways to look at that.

TIGNER: But insurance is fortuity based. And if you're trying to get coverage for something that is not a fortuity, and if you're talking about covering intentional acts or assaults that is something...

O'NEILL: But that gets us back to the original question. That's an independent liability basis against the employer separate and apart from the suit, and this court has recognized causes of action that would put liability on the employers. That's a different scenario isn't it? I mean your saying clearly it's covered, always has been. If we hold that it's not or there is no duty to defend, you will have a windfall. So those are just two sides of the same argument.

TIGNER: Yes, there is obviously two sides to the argument.

O'NEILL: You're both claiming the sky is going to fall if we rule one way or the other?

TIGNER: Yes. The fifth reason is, I think Texas would join the minority of states that have decided this issue. The first reason is, I think, it will encourage manipulation of pleadings. This court in Gandy eliminated Mary Carter agreements. They eliminated sweetheart deals. They wanted to have the litigation straight up. In this case, the petition of the plaintiff was pled as an intentional act case. Dallas Fire denied coverage. They then amended their pleading and said, well, you didn't provide training to the employee so he wouldn't know how to handle the situation when someone else came up to him and accused him of stealing something. And so he negligently reacted to this because you didn't give him that type of training.

I think maybe the most egregious example was the one cited in the USAA amicus brief where they are talking about the lady in Florida who was murdered by her husband or hired somebody to murder her, and he was convicted. And they sued him and his second wife, and they sued her claiming that she failed to recognize that her husband may be planning to murder her, and she negligently did that. So we're now talking about encouraging creative pleading to get into coverage.

And I suppose the final reason, this court has previously decided a separation of insureds case language in Commercial Standard v. American General back in 1970. And towards the end of the opinion, at the last 2 pages, they talk about what was the purpose of the separation of insureds clause. And they talked about that the exclusion, some exclusions would say "the insured," some exclusions would say "any insured." And the purpose of the separation of insureds was so each insured could have his or her or its own conduct judged independently. And most of these cases involving separation of insureds have been involved in indemnity issues.

HANKINSON: Let's get to looking at the language in the policy, because that's what we're here to talk about in interpreting the policy. Correct?

TIGNER: Yes.

HANKINSON: And I understand that your position that separation of insured clause should only be applied for looking at exclusion?

TIGNER: Yes.

HANKINSON: And you cited some cases to us and I know your opponent disagrees with that. But what language in §47 of the insurance policy, the separation of insureds clause in any way could be construed to limit the application of that clause to just the exclusions? I'm having had a hard time - what would I hang my hat on if I wanted to go your way?

TIGNER: I don't know if there is anything per se in the definition that you could...

HANKINSON: Any language in the policy that supports your position?

TIGNER: No. I think you have to look at how it would apply.

HANKINSON: Well if the separation of insureds clause provision of the policy is not limited to the exclusions in the policy, but in fact is applied to the policy because it covers any rights or duties specifically assigned in this coverage part, if that were the case and we are dealing with two separate claims being made against two insureds under the policy for different tortuous activity, and I have a vicarious liability claim, we have direct liability claims being made against each for their own conduct, then why wouldn't we apply that in interpreting what an occurrence is and look to the occurrence in the context of the employer in the negligent hiring case separately to determine whether or not there was an accident?

TIGNER: Because it's part of the occurrence. Occurrence has got to cause either bodily injury or property damage.

HANKINSON: They claim in this that the occurrence of negligently hiring was a proximate cause of the injury that occurred during the altercation.

TIGNER: But then you have to cross the line.

HANKINSON: But that's a recognized cause of action in Texas isn't it, and it's been pled in the case?

TIGNER: It is a recognized cause of action, but then you go back to the Cowan and MidCentury cases, which hold that you look at the conduct - was it intentional, voluntary conduct? Certainly they decided not to do any investigation before they hired Mr. Lopez. They decided not to give him any supervision, not to give him any training. Those are certainly intentional voluntary acts.

HANKINSON: But then the question becomes were they acting as the reasonable prudent employer when they did it. Not every employer would have to - I mean certainly if I'm driving my car and I run a red light, I could either do it intentionally or I can do it negligently, because I just was paying close enough attention. So again we're getting back to the merits and we have to stick to the four corners of the pleading. So I'm trying to understand if the separation of insurance clause is not limited to exclusion, then wouldn't it be applied to occurrence to treat - I'm having trouble with this idea of the two direct liability theories.

TIGNER: First of all, there has never been a case that has held that the separation of insureds language applies to occurrence. It's always been decided in terms of the exclusions.

ENOCH: Let's suppose we have a negligent hiring and we have an injury. If the separation of insureds clause doesn't apply, and if an occurrence means what is argued here intentionally, is it relevant whether or not the injury that occurred - if you negligently hired x, y, z individual who didn't know how to use the machine properly, intended to use the machine this way, and it caused an injury, to get coverage is the negligence that you're concerned about for this accident the negligence of the operator of the machine or is it negligence in the hiring?

TIGNER: I think it has to be the act of the employee that caused the injury. The but for clause. As this court held...

ENOCH: It's immaterial for coverage purposes about the hiring - I mean that doesn't play in to whether there's coverage, whether or not the hiring was negligent?

TIGNER: I don't believe so. Because as this court has said, to determine occurrence you look at the origin of the damages.

HANKINSON: That's why I want you to help me understand, because the allegation is that the negligent hiring was an additional proximate cause of the injuries. And you can have more than one but for clause. And it is a proximate cause as well. So if I'm an insured under a policy, an occurrence based policy, and I am seeking protection from liability for my actions and someone pleads a cause of action against me that my negligence was the but for or a proximate cause of the injury, then why wouldn't that be an occurrence under the policy?

TIGNER: Because not all acts of negligence are occurrences. Because to use the deer hypothetical that was used in Cowan where an individual intended to shoot the deer, ended up shooting another hunter. Suppose you have the hunter out there close to the deer in the line of view, and the hunter says, I'm really a great shot. I can put it 3 inches to the left of that other hunter, and I can hit the deer. And instead of hitting the deer, he hits the other hunter. Certainly that's an intentional act and the consequences had to be expected. Was he negligent? Yes, he may have been negligent because his conduct fell below the standard of a reasonable man. But that's not an occurrence. So not all negligence is occurrence.

HANKINSON: Let's just say we just had a negligent hiring _____. You're saying that negligent hiring could never be an occurrence?

TIGNER: No, because in this case they hired exactly who they wanted to hire. They gave exactly the training they wanted to give and they gave exactly the supervision. Those are intentional and voluntary acts.

HANKINSON: But if I drive my car into an intersection when I shouldn't and I get hit, I intended to drive my car into the intersection, that doesn't make it an intentional tort.

TIGNER: But automobile policies are not occurrence based. They are, we will pay for your liability.

HANKINSON: Then tell me what would be an occurrence that would not be subject to the exclusion for intentional conduct?

TIGNER: The classic example was the one given in Cowan where the man is out hunting in the bushes. He sees a deer. He shoots for the deer and for some reason some hunter pops up and gets shot. The man certainly intended to pull the trigger. He did not intend the consequences of hitting the other hunter. And that was sort of out of the ordinary, not expected or intended because we're assuming he did not see...

ENOCH: How is that different than your negligent hiring? I intend to hire this person, but in hiring that person, I certainly don't intend that person to go off and go a different direction and kill somebody.

TIGNER: Because the negligent hiring and training and supervision was not the but for cause of the injury to the plaintiff in the underlying case.

OWEN: But then you keep saying it's the damage to the third party, whether it's negligence or tort that controls the separation of insureds...

TIGNER: Yes.

OWEN: Well this is a rather sinister example. But let's suppose that my wealthy father was aged and ill, and I wanted to hurry along his demise, and I hired a nurse that I knew to be incompetent by hoping that she would mismedicate him or over-medicate him and shorten his life. And she did so negligently, not intentionally, but that was the intended result on my part. Now who would be insured under that policy? She's my employee.

TIGNER: You come down to an intentional act - you intentionally hired who you wanted to hire.

OWEN: Knowing she was incompetent.

TIGNER: I don't think under the cases that's cited by this court there would be coverage for that claim. Because it's an intentional act. You hired who you wanted to hire, and the injuries were those injuries that you wanted inflicted upon your father or father-in-law.

OWEN: What about the employee? Is she covered? She's an additional insured under the policy.

TIGNER: I suppose...

HANKINSON: And she was negligent.

TIGNER: If she was negligent and she was covered under the policy, then she might have coverage.

RODRIGUEZ: Why are we going to these nuances? This is a duty to defend case. Why are we reserving all of these hypotheticals and nuances for the coverage issue and giving broad interpretation to the 8 corners right now?

TIGNER: This is a duty to defend. But I think you have to answer the threshold question here is, claims of negligent hiring, supervision and training occurrences under an occurrence based policy, which has deleted the language - many of the cases that have been cited in support of petitioner's argument either do not have the same definition of occurrence that's in Dallas Fire's policy, or they are different types of policies that do not have an occurrence based policy. Or if they are an occurrence based policy, they maybe have the language from the standpoint of the insured or some of the cases that have decided this petitioner's way are theory based states. They say, okay, you've been sued for negligence, we're not going to look any further, we're not going to look at the facts. That's all we're going to look at.

HANKINSON: In order to get where you would like for us to go, don't we have to go with the CA's independence analysis that has been used there and some other courts? Don't you actually have to take two alleged separate torts and tie them together so that the actual last tort feasor in the chain that the caused the incident, that's the conduct that you look to? Don't you have to tie all the

conduct together in order to get where you want to go?

TIGNER: To some extent. But if you just follow National Union v. Merchants, which says you look at the origin of the injury and the but for.

HANKINSON: I understand. Assume that I'm not with you on that argument. How am I going to get there?

TIGNER: Then I think the decisions from the 5th circuit, which have been authored by Judge Higginbotham, which have been authored by Judge Jerry Smith, which have been authored by Judge Emilio Garza, which have been authored by Judge Edith Jones, which talk about this dependent and interdependent conduct are right on point.

HECHT: I'm not sure I'm clear on your position. In this case if the actor's conduct, the employee's conduct had been negligent, would there be coverage of the negligent hiring claim against the employer?

TIGNER: Probably under the respondeat superior claim.

HECHT: But otherwise not? And I don't understand why.

TIGNER: Because again we come down to it was the intentional act issue, the voluntary conduct.

HECHT: That gets pretty metaphysical. And he intended to do it just like I intended to pull out in the intersection. I just shouldn't have done it. Anybody with a brain wouldn't have done it. He shouldn't have hired this guy. He intended to hire him. But if he had looked for 10 minutes and found out that he had a history of beating up everybody he worked with, they would have said well maybe we shouldn't put this guy out there.

TIGNER: As a practical matter, that issue probably never would arise because if they are going to give a defense to the employee, they are also going to give a defense to the employer.

HANKINSON: But under your scenario then, if I understand you correctly, let's assume that it could have happen and there would not be coverage for negligence. You're view is there is no coverage for negligent hiring because it's an intentional act. Period. Regardless of the facts.

TIGNER: In those situations where the underlying injury was caused by an act excluded by the policy.

HANKINSON: Then going back to Justice Hecht's hypothetical, let's say that that employee was negligently, and I know we can have a _____ vicarious liability theory pled, but let's say they don't plead that. They just plead an independent tort against the employer for negligent hiring. Is

there going to be a duty to defend that employer?

TIGNER: Probably so, but...

HANKINSON: Well then why would there be under that circumstance and not under the other, since the basis for your saying there's no duty to defend on negligent hires because it's intentional conduct?

TIGNER: Because the injury causing event was excluded from coverage.

HANKINSON: Then that tells us that your real theory is the interdependence theory that the 5th circuit and some other courts have used.

TIGNER: I think that is correct. But there are also the other decisions of this court in analyzing other cases. And I think this court has to reconcile and be consistent with its other opinions. And I think when you consider the National Union Merchants case, which says that you look at the origin of the cause of the injury as part of the occurrence evaluation. Because occurrence is not just an action. It has to cause bodily injury. And to satisfy the component of bodily injury, you have to cross the line. You have to look at the conduct that is excluded. So yes, you're right. But you do have to look at those cases, the dependent and interdependent cases.

The other cases from this court, you look at the facts verses theories, and you look at the but for cause of the injury, and you look at the but for cause of the injury, and you look at the origin of the injury.

BAKER: I'm a little confused too still. When we look at the employee in this case, he's another insured under the policy isn't he?

TIGNER: Yes.

BAKER: Clearly he's not covered because his act was intentional.

TIGNER: That's correct.

BAKER: And so as it is suggested, the only way you can get to the separate causes of action against the employer being not covered either is by the interdependence theory?

TIGNER: That is correct. But that is somewhat of an offshoot or consistent with what this court has held in the Merchants case, that you look at the origin of the injury. And that may be just a semantics issue.

BAKER: Would you agree that the origin of the injury means the conduct of the person you are looking at. In this case, the violent employee?

TIGNER: Yes.

BAKER: You're looking at the injury not the damages. There's a difference.

TIGNER: Well the injury was caused by the assault.

BAKER: By the assault. And clearly since he's an added insured, he's not covered. Because as Justice Rodriguez suggest, we're just looking at a duty to defend and don't we have to take under our jurisprudence the allegations in the pleading as true within the four-corners of the policy?

TIGNER: As the facts pled as being true. That is correct.

BAKER: So under that theory, the facts pled are negligent hiring, negligent training and negligent supervision led to this injury. That's what they say.

TIGNER: The facts are, no investigation, no training, no supervision, and those are intentional acts.

BAKER: Have you ever said that before in this case in your briefs?

TIGNER: I believe so.

RODRIGUEZ: Was that a basis for the denial of the insured when you denied the insured?

TIGNER: Yes, we said that there was no occurrence. That was one of the basis.

RODRIGUEZ: But as opposed to saying no occurrence because the assault was an intentional act, did you articulate in your denial letter that the negligent hiring was an intentional act?

TIGNER: I don't recall.

O'NEILL: My understanding is, that your position would be there would never be coverage for negligent hiring, training or supervision? In any situation. I'm sorry duty to defend.

TIGNER: When the injury causing act is excluded from coverage.

O'NEILL: Based on your statement though, I thought you said the employer's act was intentional.

TIGNER: It is certainly an intentional act. We have two intentional acts. They made a business decision as to who they wanted to hire.

O'NEILL: I understand. And you're saying that intent takes them out of coverage?

TIGNER: That intent combined with the but for cause of the underlying plaintiff's injury.

BAKER: That sounds kind of like interdependence to me.

TIGNER: I suppose it is. Yes.

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REBUTTAL

LAWYER: The citation to the Young case is 787 S.W.2d 50. It's reconfirmed by Texas Dept of Public Safety v. Petta, and that's 44 S.W.3d 575. The citation, the separation of insureds provision is page 55 of the record. What it says is except with respect to the limits of insurance in any rights or duties specifically assigned in this coverage part to the first named insured, this insurance applies, and the portion (b) is, separately to each insured against whom claim is made or suit is brought. There's no language in there limiting it to exclusion.

HANKINSON: Would you respond to his argument that negligent hiring does not cause bodily injury and therefore cannot be an occurrence?

LAWYER: I think there are several objections to that. If this court is going to hold there's no cause of action for negligent hiring, that might be something Carlyle King would be willing to agree to given this circumstance. However, I think this court has or the courts of Texas have determined there is such a cause of action. You can break down any negligent act into its constituent parts and determine that it's intentional. There is an intent to hire Mr. Lopez. There was an intent, a volitional act not to do a background check on him. But there was no intent that he would go out and cause the harm or the injury.

I think for intentional torts it's more of a specific intent and therefore there's going to be liability for negligent...

ENOCH: It seems to me Trinity Universal was talking about that example. If I intended to hire, and I intended not to train, that doesn't - there's nothing about that that means that I intended for my employee to go out and beat somebody up. So I think that's Trinity Universal. What I understand the argument to be, you can't get to the injury with but for the intentional conduct of the employee, and that's the problem with the 5th circuit with the interdependency. There's no way that you can get to the injury but going through the intentional act of this employee getting there. And as a result, whether they were negligent or not negligent in the hiring process, you just can't get to that injury.

The critical aspect about this is, this occurrence has to be the result of an accident and since you can't get there but for the intentional conduct of that employee, this is not an accident.

LAWYER: That is certainly something that the 5th circuit on occasion has found attractive. And more often than not that reasoning...

ENOCH: Because of all the questions we have here today, that's an easy way out.

LAWYER: That's exactly right. I do think there's some uncomfortableness with negligent hiring and training cases and intentional torts for employees and they also colored their analysis. Those interdependent related upon language comes from exclusion cases and the liquor liability exclusion that is relied upon heavily by the CA. That's the Thornhill liquor liability, Sentinel Ins., that's the motor vehicle exclusion in which the case the analysis has been if you're trying to get coverage based upon things that were not in the insurance policy and you have to go through those areas that were not insured against, then we're not going to give any coverage for it.