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Supreme Court of Texas
Gilbert Texas Construction, L.P., Petitioner,
v.
Underwriters at Lloyd's London, Respondents.
No. 08-0246

October 6, 2009

Appearances:
Craig T. Enoch, Winstead PC, Austin, TX, for petitioner.
Glenn R. Legge, Legge Farrow Kimmitt McGrath & Brown LLP, Houston, TX, for respondents.

Before:

Chief Justice Wallace B. Jefferson; Nathan L. Hecht, Harriet O'Neill, Dale Wainwright, David M. Medina, Paul W. Green, PhilJohnson and Don R. Willett, Justices.

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CHIEF JUSTICE WALLACE B. JEFFERSON: The Court is ready to hear argument in 08-0246, Gilbert Texas Construction vs. Underwriters at Lloyd's London.

MARSHALL: May it please the Court, Mr. Enoch will present argument for the Petitioner. The Petitioner has reserved five minutes for rebuttal.

## ORAL ARGUMENT OF CRAIG T. ENOCH ON BEHALF OF THE PETITIONER

ATTORNEY CRAIG T. ENOCH: Okay, may it please the Court, I'm Craig Enoch and I'm representing Gilbert Construction, the Petitioner in this case. Just a quick synopsis of the facts. Gilbert contracted with Dallas Area Rapid Transit System in Dallas to help build its rail system. During the construction of that project there were torrential rains, the rains hit the construction site, were diverted off of the construction site and into a neighboring property. RT Realty owns some of the neighboring property and sued Gilbert Construction for its activities on the construction site that they said was negligent, which had do to with the piling of dirt from the construction, piling of barricades, piling of debris that diverted the water onto their property and therefore they were liable in there. They also brought, RT did, a contract claim because in the contract with DART, Gilbert had agreed with DART that Gilbert would repair any damage that Gilbert caused in that contract. This is a commercial general liability policy

that's at issue, and this case is not about whether this was a covered event. There is no dispute, this was otherwise a covered event. The issue in this case is, is there an exclusion of this covered event.

JUSTICE NATHAN L. HECHT: The Court of Appeals said that you conceded that the exclusion applies, but argued for the exception. Is that still your position or was it then?

ATTORNEY CRAIG T. ENOCH: It was not our position that we conceded. Your Honor, we won in the trial court. We get to the Court of Appeals, their argument is that the exclusion applies and we responded to their argument that even if the exclusion applied, Exception No. 2 applied, which was we would have been liable in the absence of a contract. On motion for rehearing, when they came back and said the exclusion applied and the exception did not, on motion for rehearing, we attacked vociferously that the exclusion even applied in the case and raised it there. We do not believe we waived it any manner, shape or form.

JUSTICE NATHAN L. HECHT: So your position, to be clear, is that the exclusion doesn't apply?

ATTORNEY CRAIG T. ENOCH: Your Honor, the exclusion does not apply. You will see in issue two, if the Court concludes it does, we do fallback argument about Exception No. 2 to the exclusion. In Evanston vs. ATOFINA, this Court made clear that there is a change of burden and burden of persuasion when you're arguing under a contract. The insured, Gilbert Construction, has the burden of proof and persuasion that the event is covered. That's not an issue in this case. It's a covered event under this CGL policy, the question is does the exclusion apply? This Court has made clear, if we move to the exclusion, both the burden of proof and the burden of persuasion move to Underwriters at Lloyd's London, they have the burden. Because there is an exception that we talk about, they try and conflate the exception back into the exclusion and attempt to act like we failed to establish this. I want the Court to focus, as we do, that the question is exclusion, they have the burden of persuasion that the exclusion applies. So let's look at that. We've provided the Court with an exhibit that just excises, excerpts portions of the contract. Under Tab 1, on the first page --

JUSTICE PHIL JOHNSON: Before you get to that --

ATTORNEY CRAIG T. ENOCH: Sorry.

JUSTICE PHIL JOHNSON: The parties don't disagree that this is a following form excess policy so that we-- there's no dispute, we're on this question here?

ATTORNEY CRAIG T. ENOCH: That's correct, Your Honor.

JUSTICE PHIL JOHNSON: The parties don't disagree?

ATTORNEY CRAIG T. ENOCH: No dispute, this is following form. We are talking about an excess carrier in this case, but it is a following form, so we refer to the underlying insuring agreement. Under Tab 1 --

JUSTICE NATHAN L. HECHT: While we're on that subject, what was the primary's position? I was unclear about that.

ATTORNEY CRAIG T. ENOCH: The primary's position, no reservation of rights, they provided the defense, they contributed to the settlement.

CHIEF JUSTICE WALLACE B. JEFFERSON: And a settlement, they provided their full policy limits?

ATTORNEY CRAIG T. ENOCH: Yes, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: And then your client had to pay in excess of that?

ATTORNEY CRAIG T. ENOCH: Yes, Your Honor.

CHIEF JUSTICE WALLACE B. JEFFERSON: Okay.

JUSTICE NATHAN L. HECHT: And is there a structure of excess coverage, or is Underwriters the next one up or?

ATTORNEY CRAIG T. ENOCH: Yes, Your Honor, they are now liable for their balance that was paid in the settlement.

ATTORNEY CRAIG T. ENOCH: Under Tab 1, first page, we provide the exclusion that they rely on, that Underwriter's relies on. The Court will see that the insurance does not apply to property damage for which the insured is obligated to pay damages by reason of the assumption of liability in a contract or agreement. Underwriters --

JUSTICE HARRIET O'NEILL: Now, one argument --

ATTORNEY CRAIG T. ENOCH: I'm sorry.

JUSTICE HARRIET O'NEILL: There's a plain meaning argument that it doesn't say, assumption of another's liability in a contract.

ATTORNEY CRAIG T. ENOCH: Yes, Your Honor, there is that argument, but under ATOFINA, this Court said that if the insured's reasonable interpretation -- if the insured's interpretation of the exclusion is reasonable, even if you --

JUSTICE HARRIET O'NEILL: Well, but that kind of begs the question, because it would be unreasonable to insert language that's not there.

ATTORNEY CRAIG T. ENOCH: Or be un- --

JUSTICE HARRIET O'NEILL: They could have easily said, "another's" or a third obligation, but they didn't.

ATTORNEY CRAIG T. ENOCH: Well, yes, Your Honor, or if you exclude language that was there to reach a reasoning, excluding the word "assumption," and just say, "liability under a contract." So I think it's a straw man to argue, "Well, you're adding words," --

JUSTICE DAVID MEDINA: It's just a --

ATTORNEY CRAIG T. ENOCH: -- "'assumption of liability of another,"' when in fact they're subtracting words. You will see it in their argument that they say, "Well, assumption of liability really is what you do under a contract."

JUSTICE DAVID MEDINA: How broad is that?

ATTORNEY CRAIG T. ENOCH: The assumption of liability? It applies, it's broad enough to include when I in a contract take responsibility for the actions of another. That's what it's broad for. It is not an indemnity provision, it is not the assumption of an indemnity obligation, it is broader than that.

JUSTICE PHIL JOHNSON: But isn't that one of the definitions of "insured contract," pertain -- an insured contract under Subsection G, that part under which you assume the tort liability of another. So in this same policy, we actually refer to assuming the tort liability of another as an insured contract.

ATTORNEY CRAIG T. ENOCH: Yes, Your Honor. But the --

JUSTICE PHIL JOHNSON: But they do take, they do insure those things.

ATTORNEY CRAIG T. ENOCH: If, if what you're assuming in your contract is the tort liability of another, they will cover it. They will also cover if you assume the liability of the landlord when you're the lessee under that exception. They will, they will cover the liability that I as the lessee assume for the landlord. You will see a number of documents described under the insured contract where they will take liability of the obligation assumed, which all leads back to the position that all of the treatises say, any number of cases say, that the reason that you have assumption of liability in that provision is because the insurance company wants to make sure it controls what kind of liability you are assuming in your contract on behalf of others. But going back to the plain meaning, Your Honor, under the second page under Tab 1, you will see that in this very same policy, Underwriters itself makes a distinction between Assumption of liability

and Breach of Contract. Under Coverage B, for advertising injury, they not only exclude an advertising injury that's assumed under a contract where liability is assumed under a contract, they also exclude for advertising injury a breach of contract expressly. They know how to say we exclude breaches of contract, and they say so in their policy expressly when they intend to be breach of contract and not assumption of liability. And this is where the treatises all go, this is where the Fifth Circuit in Grapevine and Homeowners went, this is where the American Family case out of Wisconsin went.

JUSTICE HARRIET O'NEILL: But none of those cases involved sovereign immunity, and that seems to be the odd wrinkle here. The Court of Appeals seemed to get caught up in the fact that there would be no liability here but for the assumption of liability of the contract because of immunity.

ATTORNEY CRAIG T. ENOCH: Well, yes, Your Honor, but I think it's -- quite frankly, I don't understand the Court of Appeals' reasoning there. In the absence of this contract, if our construction had caused damage to the neighboring property, we would have liability. This is not a coverage question, it is clearly a covered event.

JUSTICE HARRIET O'NEILL: But that would be --

ATTORNEY CRAIG T. ENOCH: So only by the contract --

JUSTICE HARRIET O'NEILL: But that would be tort liability to which --

ATTORNEY CRAIG T. ENOCH: Correct.

JUSTICE HARRIET O'NEILL: -- you would be immune, and the only way to assume liability you would be immune from was through this contract. At least that's the argument, that's what the Court of Appeals went with.

ATTORNEY CRAIG T. ENOCH: That's their argument, but this Court in Lamar Homes said that a CGL policy is not dependent of a nature of the cause of action. We would have coverage in this policy for the property damage we caused to the neighboring property even if the claim was a breach of contract, because this Court in Lamar Homes recognized that it's an occurrence, it's an accident that generates coverage for property damage, not the contract. So you go to coverage, now you come to the exclusion, assuming the liability of another [inaudible] excluded, this is not assuming DART's liability, we were sued, Gilbert was sued directly for its own conduct that led to damage to the neighboring property. The issue about, well, the DART. Well, okay, there's sovereign immunity, so there's not tort liability, but this contract coverage isn't dependent on tort liability or not. Going to Justice Johnson's question, if you look at insured contract, if what we assumed in our contract was the liability of another, okay, we come back to the exception. What do we have in the exception? We have exactly that. If the liability of the other we assumed was for any damage they caused, then, yes, the insurance company's obligation is limited to only the tort claim, not any other claim. But if you begin, it doesn't matter whether it's contract or tort under the coverage, you move to the exclusion, then you come back full circle. The exclusion simply does not apply because it refers to our being responsible for the liability of another.

JUSTICE NATHAN L. HECHT: The Respondent argues that the damages would have different in tort.

ATTORNEY CRAIG T. ENOCH: Your Honor, I think that's a -- I just think that's a straw man because the insurance company under its obligation may have certain types of damages that it will be responsible for, but that's not a coverage question, that's a question

of the amount of damages. And actually, I think that's not really true because when you -- it's not simply the diminution of value, it is the cost to repair. We have a cap that says if the cost to repair exceeds the value of the property, you're not responsible for repairing something that's obviously not going to be repairable. So it's just a straw man. We have the obligation to repair, but the truth is our obligation to RT Realty was to pay them whatever their damages were that we caused, and tort law does create a cap on that kind of liability.

JUSTICE NATHAN L. HECHT: The damage suit was settled. Was there evidence about a difference in loss of value versus cost of repairs?

ATTORNEY CRAIG T. ENOCH: Your Honor, under ATOFINA they cannot even question the -- Underwriters, because they denied coverage, cannot even question the reasonableness of the settlement. And in the settlement, the claims were, the claims in the settlement were this: You piled up debris, you piled up dirt, you piled up barricades, and as a result, the water was diverted off to our property and caused our damage. Under the facts of the case, there is no distinction between, well, these damages were caused by a breach of contract versus tort. The underlying facts, all the damages were caused by the water flooding the property and causing damage.

JUSTICE HARRIET O'NEILL: Well, here's where I get confused, and it's just a practical question. As the insurer, I want to be able to assert whatever defenses the insured has, and so if the insured is entitled to immunity, I should be entitled to immunity too. I shouldn't have to pay liability because my insured is entitled to immunity. And the only thing that got the insured out of immunity was this contract, assumption of liability, and that seems to fit in the sovereign immunity context exactly what happened here, although it may not have been the intent in this language in terms of the immunity wrinkle, but as a practical matter, if the insured gets out because of immunity, then why shouldn't the insurer get out because of immunity?

ATTORNEY CRAIG T. ENOCH: Well, assuming the exclusion then applies, because you don't reach that question unless you decide that it's my own liability under my contract --

JUSTICE HARRIET O'NEILL: Right.

ATTORNEY CRAIG T. ENOCH: -- that excludes all my coverage. Then I suggest we don't even -- that the exception, part of it, then you get back to the express language. Is it liability we would have in the absence of the contract, because the question presupposes my contract gives me sovereign immunity.

JUSTICE HARRIET O'NEILL: And it's not liability you would have in the absence of a contract because you're immune.

ATTORNEY CRAIG T. ENOCH: In the absence of the contract, I would have liability because only by contracting with a government agency do I get this immunity. Gilbert Construction has no immunity for the damages it causes to neighboring parties. If this had been any other contractor except a government agency, there would be coverage. They would still be arguing the exclusion applied. Understand, they would be arguing that exclusion applies, they'd be saying, "Well, it's your own liability, therefore this is a contract exclusion." Our response if the exclusion applies, "Well, you look at number two." In the absence of this contract, we would have liability. We don't have to have a contract with anyone, it could be strictly a tort liability because we contracted, because we contracted, we get sovereign immunity. Number two says exactly what it says, in the absence of that contract --

JUSTICE DAVID MEDINA: Is this phrase that we're talking about, is

it so crystal clear to you? Is there any room for an ambiguity argument?

ATTORNEY CRAIG T. ENOCH: Well, Your Honor, we did raise an ambiguity argument in the Court of Appeals, and I think that argument can be made, except I think it puts the cart before the horse. This Court has set up rules of construction that you apply before you reach the ambiguity question, and I think that's the more appropriate place that this analysis goes. In ATOFINA the Court clearly held there could be competing reasonable interpretations, but if the insured under an exclusion has a reasonable interpretation, then that's the interpretation that's followed. The Court went so far as quoting a previous case, National Union Fire, to say that even if Underwriter's reasonable interpretation is more reasonable, we rule in favor of the insured, define the event that's covered. We don't reverse that burden until we have to establish an exception to the exclusion.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Mr. Enoch. Are there any further questions?

ATTORNEY CRAIG T. ENOCH: Thank you.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you. The Court is now ready to hear argument from the Respondent.

MARSHALL: May it please the Court, Mr. Legge will present argument for the Respondent.

ORAL ARGUMENT OF GLENN R. LEGGE ON BEHALF OF THE RESPONDENT

ATTORNEY GLENN R. LEGGE: May it please the Court, in the Lamar Homes opinion, this Court stated that in the State of Texas insurance policies should be written in English, preferably plain English, not code.

JUSTICE NATHAN L. HECHT: It hasn't caught on.

ATTORNEY GLENN R. LEGGE: I can't argue with that, Your Honor. This matter before the Court today involves the determination of an insurer's duty to indemnify an insured for damages it assumed in a contract. The clause in question states that the policy does not apply to claims wherein the insured is obligated to pay damages by assumption of liability in contract. Gilbert would like this Court, has requested this Court to read in language into that clause, into that exclusion.

CHIEF JUSTICE WALLACE B. JEFFERSON: But that exclusion doesn't apply if Gilbert would have been liable without the contract, absent that contract? So if they had built up a pile of dirt on their own, just went out on that site and built it up. The flood came and it damaged all of RT's property, and no contract with DART, then that exclusion wouldn't have any applicability, right?

ATTORNEY GLENN R. LEGGE: Because they're -- you're absolutely correct, Your Honor, because there is an exception to the exclusion, and the exception -- there are actually two exceptions. One is that the exclusion does not apply if that liability would have existed in absence of contract. The other exception is, as Justice Johnson pointed out, is insured liability -- insured contract exception, which provides the very definition that Gilbert is hoping this Court will apply to the exclusion. But that language in the insured contract exception to this exclusion, it describes an insured contract as that part of any other contract that the insured, in which the insured assumes the tort liability of another that is owed to a third party.

JUSTICE PHIL JOHNSON: In this case there's no-- they did not assume that tort liability?

ATTORNEY GLENN R. LEGGE: Absolutely correct. This case does not involve a contractual indemnity agreement, Your Honor.

JUSTICE PHIL JOHNSON: And in this case, if they did not have a contract with DART, would they have liability for what they did?

ATTORNEY GLENN R. LEGGE: If they did not have a contract with DART, there would be -- no, that's not necessarily the case, if I understand your question correctly, and let me try to answer it.

JUSTICE PHIL JOHNSON: Well, they had a contract with DART?

ATTORNEY GLENN R. LEGGE: Yes.

JUSTICE PHIL JOHNSON: And that contract says you're going to do certain things.

ATTORNEY GLENN R. LEGGE: Yes.

JUSTICE PHIL JOHNSON: And part of that contract is, and if you damage RT, you're going to fix it.

ATTORNEY GLENN R. LEGGE: You're going to be responsible for cost to repair, absolutely.

JUSTICE PHIL JOHNSON: Well, either cost -- that's the liability we're talking about here.

ATTORNEY GLENN R. LEGGE: Yeah, the damages that we're talking about, yes, Your Honor

JUSTICE PHIL JOHNSON: Okay, so if they don't have the contract with DART, how do they have liability to RT?

ATTORNEY GLENN R. LEGGE: If they don't have --

JUSTICE PHIL JOHNSON: DART does not have liability to RT.

ATTORNEY GLENN R. LEGGE: DART was sued in the underlying case.

JUSTICE PHIL JOHNSON: Okay, did they have immunity?

ATTORNEY GLENN R. LEGGE: Yes, they did. They asserted immunity, they received the same summary judgment that we received, or the --

JUSTICE PHIL JOHNSON: Everything is out, other than the part of the contract that Gilbert had with DART.

ATTORNEY GLENN R. LEGGE: But let me correct a misstatement I just made. DART was not entirely free of claims other than breach of contract. DART still had remaining claims against it for violations of the Water Code, inverse condemnation, and there was one other one that I'm sorry I can't --

JUSTICE PHIL JOHNSON: Well, what we're talking about here is the contractual obligation that Gilbert assumed in its agreement with DART.

ATTORNEY GLENN R. LEGGE: Correct.

JUSTICE PHIL JOHNSON: That Justice O'Neill was talking about earlier.

ATTORNEY GLENN R. LEGGE: Correct.

JUSTICE PHIL JOHNSON: And if it did not assume that obligation in that agreement, they would have had immunity as to this claim?

ATTORNEY GLENN R. LEGGE: They would not be exposed to a breach of contract claim, absolutely.

JUSTICE PHIL JOHNSON: The one that's before here?

ATTORNEY GLENN R. LEGGE: The important aspect of this case is that this is a duty to indemnify case, not a duty to defend case. Gilbert has urged the Court of Appeals, as it has urged this Court, to not consider the facts that existed at the time the underlying case was adjudicated or settled, which is what Texas law says this Court must do. You look at the actual facts that were adjudicated, that were developed, that existed at the time, in this case, that the case was settled. By doing that, you have to go with the factual scenario that there was no tort claim that could be alleged against Gilbert, it's only claim was a breach of contract claim. Now that breach of contract, you see, the immunity that exists for tort, Gilbert would have you

believe that that immunity springs fully clothed from the contract itself. The contract, nowhere in the contract between Gilbert and DART does it says, "Gilbert will enjoy governmental immunity as a primary contractor of a municipal agency." The contract doesn't say that. The immunity that was granted to DART by the trial court in the underlying matter was based upon DART's status as a primary contractor for a municipal agency, the Dallas Area Rapid Transit, and the application of Texas law to those facts. But Gilbert is very careful about trying to convince this Court and the underlying Court that the contract itself provided the immunity. Well, it does to the extent that it allows Gilbert to work as a primary contractor for a governmental agency, but no where in to that contract does it mention immunity for Gilbert.

JUSTICE DALE WAINWRIGHT: Now, the trial court granted summary judgment on all claims against Gilbert except breach of contract, right?

ATTORNEY GLENN R. LEGGE: Yes.

JUSTICE DALE WAINWRIGHT: Lloyd's didn't send Gilbert a reservation of rights asserting the exclusion for breach of contract until after that grant of summary judgment.

ATTORNEY GLENN R. LEGGE: Yep.

JUSTICE DALE WAINWRIGHT: Is that significant?

ATTORNEY GLENN R. LEGGE: No, it's not, but for a number of reasons. One is under the Ulico opinion from this Court, there is no prejudice when they're trying to argue the idea of waiver or estoppel. But to specifically address your question, Justice Green, is the issue is -- I apologize -- is the -- the reservation of rights were, the reservation of rights were issued before the summary judgment, two of them, by Gray Miller, who was the coverage counsel for Underwriters at the time, and those reservation of rights letters had the significant element of number one, they advised the insured that there would be a, there was a potential conflict of interest. Number two, they advised the insured that based upon the allegation of a breach of contract, that the issue of whether a breach of contract would be an occurrence and be covered was brought into question. So they reserved their rights on that. And they also pointed out that the Underwriters were not waiving any rights for any other terms under the contract or under the policy that existed. Shortly after, within two weeks after the summary judgment was granted on immunity, Underwriters did do a supplemental reservation of rights, where they pointed out Exclusion 2B. And the reason they pointed out Exclusion 2B at that point in time is because at that point there was no negligence cause of action pending against Gilbert. Exclusion 2B would not have applied prior to that ruling because Exclusion 2B would be subject to an exception. Exclusion 2B says it excludes coverage for claims where the insured is obligated to pay damages by reason of assumption of liability in contract, but it excepts out of that liability that would exist in absence of the contract. Before the summary judgment was granted, there was a claim that would provide liability in absence of the contract, and that was a straight tort negligence claim. Exclusion 2B wasn't applicable until after that summary judgment was granted, because at that point in time only the contractual breach of contract claim was alleged.

JUSTICE HARRIET O'NEILL: But under your argument, there's no coverage here in any event. I mean you're insuring nothing really if Gilbert is immune, pursuant to its contract with DART, then there's no way they could be covered?

ATTORNEY GLENN R. LEGGE: In this very narrow fact situation where you have governmental immunity and a prime contractor that is assuming

a contractual liability, not just for the damage to adjacent structure, but to repair adjacent structure, there is no coverage for this.

JUSTICE PAUL W. GREEN: Well, what would be covered under these facts? What did you do for the premium that you accepted?

ATTORNEY GLENN R. LEGGE: If there was no governmental immunity?

JUSTICE PAUL W. GREEN: No, under these facts. The governmental immunity, the DART contract, the agreement, the contractual agreement to pay for repair if they did something wrong.

ATTORNEY GLENN R. LEGGE: There was no coverage provided for a purely contractual claim for cost of repair and attorneys fees. At the time the case was settled, the only claim was a pure breach of contract claim, unaccompanied by any tort claim. This is unlike the Lamar Homes case or any other case this Court has recently heard, because A, it's a duty to indemnify claim where you're looking at the actual facts, not what if this existed.

JUSTICE PAUL W. GREEN: Well, I'm looking at what circumstance would arise where there would be coverage under your policy?

ATTORNEY GLENN R. LEGGE: If there was no immunity. But if you're talking about the facts of this case --

JUSTICE PAUL W. GREEN: Yeah, Underwriters issued this policy understanding the immunity situation, that you had DART that was there, so they issued the policy understanding that there was immunity involved, so I'm asking you under these facts, what coverage was available to Gilbert for the premium that they paid?

ATTORNEY GLENN R. LEGGE: There was none available to Gilbert once they received the immunity. If you're asking about scenarios where coverage would exist, if there were exceptions to the Texas Government Code concerning immunity, such as a contract clause or a, I believe it's the use of an automobile that involves in a tort in some situations, there are instances where immunity would not exist, in which case the coverage would come into play.

JUSTICE PAUL W. GREEN: My question is what could Gilbert have done that would have triggered liability -- well, triggered coverage under this policy?

ATTORNEY GLENN R. LEGGE: In absence of a --

JUSTICE PAUL W. GREEN: No, under the circumstances that existed.

ATTORNEY GLENN R. LEGGE: When they enjoyed immunity from tort, there was nothing that Gilbert could do to trigger coverage once immunity was provided. Immunity was not provided until well into the underlying trial. This was not a threshold decision.

JUSTICE PAUL W. GREEN: Well, I understand that.

JUSTICE DAVID MEDINA: Do they get a refund of their premium? It seems like they paid for nothing.

ATTORNEY GLENN R. LEGGE: They did not, and just as I don't think Underwriters got to make a supplement premium call, if they did not enjoy immunity, or if they were a contractor that was in a hierarchy that didn't get immunity. I don't think Underwriters received a supplemental premium for those situations.

JUSTICE DAVID MEDINA: Would the --

JUSTICE PHIL JOHNSON: I have forgotten on this, was this policy applicable only to the contract that the work that Gilbert was doing for DART?

ATTORNEY GLENN R. LEGGE: No. It was issued to DART and --

JUSTICE PHIL JOHNSON: Issued to DART or to Gilbert?

ATTORNEY GLENN R. LEGGE: Yes, it was issued to DART. And Gilbert came under it as an OCIP, an Owner Controlled Insurance Program.

JUSTICE PHIL JOHNSON: And so the contract, the CGL contract for

Gilbert was applicable only to Gilbert's work for DART?

ATTORNEY GLENN R. LEGGE: No, no, I can't tell you that, Your Honor, because in an Owner Controlled Insurance Program sometimes there are other projects that are assigned to it and other contractors are available to come in to be covered on, in those situations. The damage model that Gilbert is saying is a straw man, is a stocking horse we placed out there, in this situation there is evidence of, and the record has it, of the damage model being the cost of repair because it's a contractual obligation. The evidence in the record indicates that the fair market value of the adjacent structure prior to the accident was approximately $8 million. The cost of repair of the Republic Towers was approximately $17 million. Shortly before the case was settled, the underlying Court gave a ruling that Republic Towers' claim would not be limited to the tort model, the tort model being diminution in value of fair market value. That is the tort model if repair is not feasible under Texas law, and repair is not feasible under Texas law if it far exceeds the fair market value of the property. Gilbert's emphasis of case law being in the majority on Exclusion 2B warrants some review, particularly in regard to the Olympic vs. Province case, which is the foundation case for almost every opinion and every treatise that Gilbert has provided in support of its position. The Olympic case is out of the Alaska Supreme Court and it involves the analysis of an insurance clause that was not 2B, or Insurance Exclusion 2 that we're looking at today. It didn't analyze Exclusion 2. It analyzed an exclusion that said, "Coverage is not provided to liabilities assumed by the insured except for incidental contracts." Full stop. There was no exceptions for insured contracts, there was no exceptions for liability that exists in absence of contract. That is the Olympic opinion, it does not analyze Exclusion 2. The Federated opinion out of the Fifth Circuit --

CHIEF JUSTICE WALLACE B. JEFFERSON: Well, let's just analyze Exclusion 2 one more time, and let me give you a chance to respond to this. There is coverage, there's coverage because this exception applies. The exception applies because Gilbert would have been liable if there had not been a contract with DART. Can you, how would you answer that?

ATTORNEY GLENN R. LEGGE: This Court cannot analyze and not make a determination of a duty to indemnify based upon facts that don't exist at the time the case was settled.

CHIEF JUSTICE WALLACE B. JEFFERSON: And which facts did not exist when the case was settled?

ATTORNEY GLENN R. LEGGE: The facts that didn't exist was that this contract was not absent, this contract was present. To consider this case in the context of --

CHIEF JUSTICE WALLACE B. JEFFERSON: But the exclusion proposes,it's kind of a hypothetical, right? The exclusion doesn't apply to liability that the insured would have in the absence of the contract or the agreement?

ATTORNEY GLENN R. LEGGE: Right, absolutely. And that would be a tort liability that would not be occasioned or that would not exist by if the insured did not have immunity. But in this case the insured did have immunity, and that's where Gilbert keeps on pushing this Court and the underlying Court to say, "Don't look at the facts that existed at the time. Don't consider what actually occurred when this case was finally settled. Speculate with us what would have happened had the contract not been present or had immunity not been present in this case." That's not what Texas law allows in a duty-to-indemnify

scenario.

JUSTICE NATHAN L. HECHT: Would this same policy be issued to a private owner or contractor?

ATTORNEY GLENN R. LEGGE: The CGL, the underlying CGL that we're looking at, the Argonaut policy, Your Honor, it would not be issued to a -- I don't think it would be issued to a homeowner because it's a --

JUSTICE NATHAN L. HECHT: No, but I mean a general owner/contractor, somebody in DART's position but not a government entity.

ATTORNEY GLENN R. LEGGE: Yes, I would anticipate that it would.

JUSTICE NATHAN L. HECHT: But why should it operate so differently depending on whether the insured is a government entity or a private entity?

ATTORNEY GLENN R. LEGGE: Once again, it is an insurance policy that is aimed at providing coverage for a tort-based claim, which certainly the exceptions are what the exceptions buy back from the exclusion. The idea is that they will respond to tort-based claims or claims for violations of duty as long as they exist in the absence of a contract.

JUSTICE NATHAN L. HECHT: But for a private person in that position, tort liability is everything. For a government entity in that position, it's essentially nothing.

ATTORNEY GLENN R. LEGGE: Except for some exceptions to it, but I agree, Your Honor, there are exceptions to the Tort Government Code in regard to tort immunity with regard to the contract issues and I think automobile.

JUSTICE NATHAN L. HECHT: Is there any evidence about how prevalent a contract like this is in the government contracting?

ATTORNEY GLENN R. LEGGE: The record doesn't contain any evidence of that.

JUSTICE DALE WAINWRIGHT: So you're saying this, the exclusion is intended to prevent coverage for any tort liability the subcontractor has by virtue of doing business with a governmental entity?

ATTORNEY GLENN R. LEGGE: No. It was not --

JUSTICE DALE WAINWRIGHT: It's not that broad?

ATTORNEY GLENN R. LEGGE: I was not trying to make that assumption.

JUSTICE DALE WAINWRIGHT: Well, if immunity is going to bar liability against a governmental entity with few exceptions, then you're going to bar this coverage for tort liability in most all circumstances, aren't you?

ATTORNEY GLENN R. LEGGE: Not in the circumstances where it would apply to a tier of subcontractor who would not enjoy immunity.

JUSTICE DALE WAINWRIGHT: To a what?

ATTORNEY GLENN R. LEGGE: To a tier, in the hierarchy of contractors working for a municipal agency. DART, based upon the Ruling of the lower court, enjoyed immunity because it was a primary contractor. There are subcontractors below that, as this Court knows in construction defect, subcontracts are frequently used. There is a tier of subcontractors that would not be enjoying that immunity because they are not high enough in the hierarchy of municipal agency contractors. So I'm not trying to avoid your question, I'm saying, just trying to respond to it saying, yes, there would be a scenario --

JUSTICE DALE WAINWRIGHT: But as to entities in Gilbert's situation, it essentially bars coverage for its tort liability?

ATTORNEY GLENN R. LEGGE: We will freely admit, Your Honor, that neither side has been able to find any case in any jurisdiction on these narrow facts involving immunity and a contractually-assumed

liability other that--that requires the insured to conduct or pay for damage that is above and beyond a tort damage.

JUSTICE DALE WAINWRIGHT: And you acknowledge with Justice Hecht's question that that's going to operate differently if you have a commercial owner or general contractor versus DART, a governmental entity in this case?

ATTORNEY GLENN R. LEGGE: It would -- I don't know if the policy would function or--

JUSTICE DALE WAINWRIGHT: The effect will be different?

ATTORNEY GLENN R. LEGGE: The effect would be different because of the existence of immunity in this situation. I have 22 seconds left, and in that time, if there's no other questions, I would urge the Court to look, read the Olympic vs. Providence opinion, because the tension that arise here is, under Gilbert's interpretation we are excluding a contractual indemnity agreement, and then through an exception to that contractual indemnity agreement, we are providing coverage for a contractual indemnity agreement. That's an unreasonable interpretation under ATOFINA, that is an illogical interpretation under Texas law.

CHIEF JUSTICE WALLACE B. JEFFERSON: Thank you, Counsel. Are there any further questions? Thank you. The Court will hear rebuttal.

REBUTTAL ARGUMENT OF CRAIG T. ENOCH ON BEHALF OF PETITIONER

JUSTICE DAVID MEDINA: Mr. Enoch, this is a pretty strong statement, I think. You can't make a coverage decision of facts that did not exist at the time of the settlement. How do respond to that?

ATTORNEY CRAIG T. ENOCH: Your Honor, very quickly, Mr. Legge is confusing law issues with fact issues. The facts did not change, the facts did not change after the judgment, the facts have always been the facts and the facts are undisputed. This was covered, unless an exclusion applies. Their argument is because of the sovereign immunity, which is a legal question, came to bear on this that they then could deny coverage because of the immunity for the tort claim, ignoring again that this is a commercial general liability policy that covers the event irrespective of whether it's breach of contract or tort claim. I would like to correct one thing. It would come as a surprise to DART that the policy that they sold to DART doesn't cover any events that result from working for DART. The Certificate of Insurance in this case is issued to Dallas Area Rapid Transit and it is issued for the purpose of building their starter line rail, their rail-line that this contractor was working on. Gilbert was an additional insured under that contract, and Gilbert is claiming their coverage for their event that they are being asked to be liable for. Bruner, one of the authorities that this Court had relied on, Lamar Homes, has just issued its most recent writing about this.

JUSTICE HARRIET O'NEILL: Again, I understand all the writings that you've talked about and cited, but none of them deal with the immunity wrinkle, which is what makes this so odd.

ATTORNEY CRAIG T. ENOCH: Well, Your Honor, maybe if they don't get to the immunity issue because you would not reach the immunity issue unless this was an assumption of liability under the contract, which this case is not.

JUSTICE HARRIET O'NEILL: Well, maybe they don't get to it because aren't we the only state that affords this type of immunity?

ATTORNEY CRAIG T. ENOCH: That may be correct, Your Honor, and that may be unusual, but as I suggest in the briefing, many contractors work

for many government agencies and so this not a unique circumstance, this will be a significant circumstance.

JUSTICE DAVID MEDINA: What were you saying before Justice O'Neill's question about Bruner and Lamar Homes?

ATTORNEY CRAIG T. ENOCH: Your Honor, in Bruner, which is an authority that this Court relied on in Lamar Homes, Bruner issued its update, and it specifically refers to this Court of Appeals' opinion in this case as misleading the assumption of liability exclusion in the policy, and shows it as an example of how some, a minority of courts, have misread that. But then goes on to conclude that the vast majority of courts that have addressed that exclusion says it does not apply to the duty that is accepted under a contract for which you are sued if you breach it, as opposed to in your contract you assume a liability of someone else. This Court in Lennar Corporation, on the day that it issued Lamar Homes denied the petition in Lennar. Lennar was an indemnity case suing for indemnity and Lennar addressed specifically the question of this exclusion, saying the exclusion was for assumed liability, not for breach of contract, and was denied in this case. But that's not all of it, the cases they cite, particularly like the Eighth Circuit case that they cite for their proposition that this is a breach of contract exclusion doesn't even follow itself. The Eighth Circuit issued the opinion, the district court in Minnesota that the Eighth Circuit was opining under an Erie guess, didn't go with them because a Minnesota Court of Appeals said, "No, the assumption of liability is the assumption of liability of another and not a breach of contract." Later the Eighth Circuit comes back and addresses a similar provision out of Arkansas. Now, these are policies around the country. The Eighth Circuit addressing out of Arkansas says, "This is an assumption of liability, this is not a contract exclusion, so the Eighth Circuit doesn't even follow the Eighth Circuit."

JUSTICE NATHAN L. HECHT: Did DART have other similar contracts with people working on the job, like this contract with Gilbert?

ATTORNEY CRAIG T. ENOCH: Your Honor, I do not know. I'm assuming was a-- it followed form from DART for all of their contractors, but I do not know that answer.

JUSTICE NATHAN L. HECHT: Would it have the same, would it have this contract, "You have to pay us for any damage you do," would it have that with subcontractors, or do you have any idea?

ATTORNEY CRAIG T. ENOCH: That I do not know, Your Honor.

JUSTICE NATHAN L. HECHT: Do you know whether these kinds of contracts are typical in government work?

ATTORNEY CRAIG T. ENOCH: It's my belief they are typical in government work, but I don't have the --

JUSTICE NATHAN L. HECHT: Nothing in the record, though, I guess?

ATTORNEY CRAIG T. ENOCH: We haven't cited that.

JUSTICE PHIL JOHNSON: Counsel, would you address just a moment the estoppel issue. There seems to be a disconnect. Your position in your brief is that Underwriters said, "Assert immunity or we're going to claim lack of cooperation." And Underwriters says that your defense counsel said, "I didn't know anything about that. I just made the decision to assert immunity on my own." Is there a difference in the record --

ATTORNEY CRAIG T. ENOCH: Your Honor, if the Court --

JUSTICE PHIL JOHNSON: -- or are we missing something here?

ATTORNEY CRAIG T. ENOCH: Your Honor, we cited from the transcript where Mr. Grau, who was Argonaut's lawyer, our lawyer under the primary carrier, said expressly, "I had no question that if I did not move

forward on the summary judgment on the sovereign immunity that they would invoke the non-cooperation clause." We do think it's significant, the timing, Justice Wainwright -- I'm sorry, that's my time now.

CHIEF JUSTICE WALLACE B. JEFFERSON: Are there any further questions?

JUSTICE DALE WAINWRIGHT: Could I hear the answer to? He's got a different answer apparently to my question than opposing counsel gave, if I may, Chief?

CHIEF JUSTICE WALLACE B. JEFFERSON: Please. Mr. Enoch?

ATTORNEY CRAIG T. ENOCH: Thank you, Justice Wainwright. You asked about the timing. A nuance in this that I think the Court, I asked the Court to pay attention to is this was a legal -- this was a strategic maneuver. Entities can waive sovereign immunity, governmental entities can waive sovereign immunity and they do it every day. Individuals can waive different defenses, depending on their strategic position. In this case, the argument that's being made, particularly about the summary judgment, yes, if we have, if we're informed about what our insurer was going to do, we could have made an informed decision, bring the summary judgment and try and settle it with the issues still pending, and then fight with them on non-cooperation. We could have chosen to do that, or we could have chosen to bring the summary judgment and run the risks. What we didn't know, what we didn't know, before they insisted we bring the summary judgment, they had decided that they would invoke the exclusion, and we didn't know about it. And they argue we didn't take control of the case. The evidence is undisputed. If you don't do this, we invoke uncooperation, and their own agreement says the only time they can invoke uncooperation is when they assume the defense. It is sophistry to say that they can threaten you with uncooperation, but because you don't then challenge them, they haven't asserted it. So, yes, the timing is critical, and I think it's a nuance about -- they took a strategic position to the harm of their client, making their client take an uninformed decision about what to do.

CHIEF JUSTICE WALLACE B. JEFFERSON: Any further questions? Thank you, Counsel. The cause is submitted, and the Court will take a brief recess.

[End of Audio Recording.]

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