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NO. 08-0890

IN THE SUPREME COURT OF TEXAS

OFFSHORE SPECIALTY FABRICATORS, INC., ET AL,

PETITIONERS,

V.

WELLINGTON UNDERWRITING AGENCIES, LTD., ET AL

RESPONDENTS.

*On Petition for Review from the
Fourteenth Court of Appeals at Houston, Texas*

**PETITIONER OFFSHORE SPECIALTY FABRICATORS, INC.'S
REPLY TO WELLINGTON UNDERWRITING AGENCIES, LTD.'S
RESPONSE TO PETITION FOR REVIEW**

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TABLE OF CONTENTS

	PAGE
TABLE OF CONTENTS	i
INDEX OF AUTHORITIES	ii
I. THIS COURT HAS JURISDICTION OVER OSFI’S APPEAL BECAUSE THE OPINION ISSUED BY THE COURT BELOW CONFLICTS WITH PRIOR OPINIONS ISSUED BY THIS COURT AND OTHER INTERMEDIATE COURTS OF APPEAL	1
A. The Fourteenth Court of Appeals Misapplied the Holding in <i>Westchester</i>	1
B. By Relying on <i>Gibson</i> to Reach its Conclusion, the Fourteenth Court of Appeals Failed to Apply the Principles Controlling the Construction of Insurance Policies	3
C. The Fourteenth Court of Appeals Impermissibly Shifted the Burden to OSFI to Establish Coverage	4
D. By Shifting the Burden to OSFI to Establish Coverage, the Court Below Failed to Require the Underwriters to Demonstrate an Exclusion Precluded Coverage of Weather Stand-by Charges	6
II. THE COURT SHOULD EXERCISE JURISDICTION OVER THIS CASE BECAUSE IT HAS BROAD-REACHING IMPLICATIONS IN THE INTERPRETATION OF EXCLUSIONS FROM COVERAGE IN INSURANCE POLICIES	7
CONCLUSION	7
CERTIFICATE OF SERVICE	8

INDEX OF AUTHORITIES

CASES

<i>Brownsville Fabrics, Inc. v. Gulf Ins. Co.</i> , 550 S.W.2d 332 (Tex.Civ.App. - Corpus Christi 1977, writ ref'd n.r.e.)	6
<i>Employers Cas. Co. v. Block</i> , 744 S.W.2d 940 (Tex. 1988).....	4
<i>Evergreen Nat'l Indem. Co. v. Tan It All, Inc.</i> , 111 S.W.3d 669 (Tex.App. - Austin 2003, no pet.)	4
<i>Gibson v. Turner</i> , 156 Tex. 289, 294 S.W.2d 781 (Tex. 1956)	3, 4
<i>Miles v. Royal Indemnity Co.</i> , 589 S.W.2d 725 (Tex.Civ.App. - Corpus Christi 1979, writ ref'd n.r.e.)	6
<i>Muniz v. State Farm Lloyds</i> , 974 S.W.2d 229 (Tex.App. - San Antonio 1998, no writ)	6
<i>National Union Fire Ins. Co. of Pittsburg, Pa. v. Hudson Energy Co., Inc.</i> , 811 S.W.2d 552 (Tex. 1991)	6
<i>Sink v. Progressive County Mut. Ins. Co.</i> , 47 S.W.3d 715 rev'd on other grounds 107 S.W.3d 547	4, 5
<i>State Farm Fire & Cas. Co. v. Reed</i> , 873 S.W.2d 698 (Tex. 1994)	6
<i>Telepak v. United Svcs. Auto. Assn.</i> , 887 S.W.2d 506 (Tex.App. - San Antonio 1994, writ denied)	4
<i>Venture Encoding Service, Inc. v. Atlantic Mut. Ins. Co.</i> , 107 S.W.3d 729 (Tex.App. - Fort Worth 2003, pet. denied).....	4
<i>Wellington Underwriting Agencies, Ltd. v. Houston Exploration Co.</i> , 267 S.W.3d277 (Tex.App. - Houston [14 th Dist.] 2008, pet. filed)	1, 3, 5
<i>Westchester Fire. & Ins. Co. v. Stewart & Stevenson Services, Inc.</i> 31 S.W.3d 654 (Tex.App. - Houston [1 st Dist.] 2000, pet. denied)	1, 2

SECONDARY SOURCES

COUCH ON INSURANCE 3D Section 140:50.....6

TO THE SUPREME COURT OF TEXAS:

I. **THIS COURT HAS JURISDICTION OVER OSFI'S APPEAL BECAUSE THE OPINION ISSUED BY THE COURT BELOW CONFLICTS WITH PRIOR OPINIONS ISSUED BY THIS COURT AND OTHER INTERMEDIATE COURTS OF APPEAL.**

This Court has jurisdiction over OSFI's appeal under §22.001(a)(2) of the Texas Government Code because the opinion issued by the Fourteenth Court of Appeals conflicts with prior opinions issued by this Court and other intermediate courts of appeals.

A. ***The Fourteenth Court of Appeals Misapplied the Holding in Westchester.***

This Court has jurisdiction over OSFI's appeal because the Fourteenth Court of Appeals' improperly applied the holding in *Westchester Fire Ins. Co. v. Stewart & Stevenson Services, Inc.*¹ to conclude that stricken language can be considered when construing an all-risk insurance policy.

In reaching the conclusion that the stricken language of Paragraph 13 should be considered in making the determination as to whether coverage existed for weather stand-by charges, the court below relied heavily upon *Westchester*.² However, the court below's application of the holding of that case was flawed.

Westchester involved the interpretation of a "drop down" provision of an insurance policy to determine whether an excess policy was triggered.³ And while *Westchester* concerned the interpretation of an insurance contract, the policy at issue was

¹ 31 S.W.3d 654 (Tex.App. – Houston [1st Dist.] 2000, pet. denied)

² *Wellington Underwriting Agencies, Ltd. v. Houston Exploration Co.*, 267 S.W.3d 277, 287 (Tex.App. – Houston [14th Dist.] 2008, pet. filed)

³ *Id.*

not, as in this case, an all-risk policy. Furthermore, and even more telling, *Westchester* did not involve a situation where a policy provision was interlineated and the crossed out text remained in the body of the policy.⁴ Rather, in *Westchester*, not only was the prior definition of “loss,” which included defense costs, deleted entirely from the policy, but the paragraph preceding the active definition expressly stated defense costs were excluded from the definition of “loss”.

Thus, the *Westchester* court was not interpreting a stricken provision, as is the case here, but was interpreting an express, written provision stating that defense costs were deleted from the definition of “loss.” Because the policy in *Westchester* expressly stated that defense costs were excluded from the definition of “loss,” that court was not faced with the same situation presented in this case, where there is *no language* clearly and unambiguously excluding or limiting coverage for standby charges. Rather, it was interpreting a clear and unambiguous statement contained within the four corners of the policy that defense costs were not included in the definition of “loss”. If anything, the decision in *Westchester* supports OSFI’s position that absent any express language otherwise, a deleted provision – which paragraph 13 is conceded to be by all parties – should be interpreted as if it is not present in the text of the policy and should not be considered when interpreting the policy.

Because the Fourteenth Court of Appeals’ application of *Westchester* conflicts with the very holding of that case and the manner in which the *Westchester* interpreted the policy at issue, it is in conflict with the *Westchester* court.

⁴ *Id.* at 659-660

B. By Relying on *Gibson* to Reach its Conclusion, the Fourteenth Court of Appeals Failed to Apply the Principles Controlling the Construction of Insurance Policies.

Gibson v. Turner concerned the interpretation of an oil and gas lease; particularly, the construction of a royalty clause.⁵ The *Gibson* court was faced with the issue of whether the striking of the proportionate reduction clause from an oil and gas lease could be considered when construing a royalty reservation of “1/8th of that produced and saved from said land”.⁶ That court ultimately concluded that taking the stricken provision into consideration was appropriate because it evidenced the intent of the parties not to limit the royalty provision.

This court below relied upon the *Gibson* court’s statement that it specifically considered the stricken provision to support the proposition that the striking of paragraph 13 could be considered when interpreting the Policy.⁷ While such a practice may be acceptable when interpreting ordinary contracts, it does not harmonize with the established guidelines concerning the interpretation of all-risk insurance policies, which require that any limitation or exclusion of coverage must be made in clear and unambiguous language. It is undisputed that the Policy contained no clear and unambiguous exclusion of standby charges.⁸ Therefore, by employing the rationale extolled in *Gibson* to conclude otherwise, the Court ran afoul of established principles governing the interpretation of all-risk policies.

⁵ 294 S.W.2d 781 (Tex. 1956)

⁶ *Id.* at 296-297

⁷ *Wellington Underwriters*, 267 S.W.3d at 287

⁸ SR at 2265 (pg. 263, lines 2-6)

Furthermore, by utilizing *Gibson* to effectively exclude coverage for standby charges, the court below reversed the rule that once the insured has established a loss, the burden shifts to the insurer to establish that it is excluded by an express provision. Thus, the court below shifted the burden to OSFI to prove that standby charges were covered despite the case law to the contrary holding that once OSFI proved an Occurrence – an issue not disputed by the parties – under this all-risk policy, the burden shifted to Underwriters to prove a clear and unequivocal exclusion for stand by charges. The court below improperly shifted the burden to OSFI to prove inclusion, rather than to Underwriters to prove exclusion.

Because the court below’s application of *Gibson* to conclude that the interlineated language could be considered when interpreting the Policy runs afoul of established principles regarding the interpretation of insurance contracts, this Court has jurisdiction over OSFI’s appeal.

C. The Fourteenth Court of Appeals Impermissibly Shifted the Burden to OSFI to Establish Coverage.

The insured has the initial burden of establishing its loss is covered by the policy.⁹ Once this initial burden has been satisfied and coverage is established, it becomes the insurer’s burden to prove that coverage for the loss is precluded by an exclusion.¹⁰ Only

⁹ *Employers Cas. Co. v. Block*, 744 S.W.2d 940, 945 (Tex. 1988)

¹⁰ *Telepak v. United Svcs. Auto. Assn.*, 887 S.W.2d 506, 507 (Tex.App. – San Antonio 1994, writ denied); see also *Evergreen Nat’l Indem. Co. v. Tan It All, Inc.*, 111 S.W.3d 669, 675 (Tex.App. – Austin 2003, no pet.); *Venture Encoding Service, Inc. v. Atlantic Mut. Ins. Co.*, 107 S.W.3d 729, 733 (Tex.App. – Fort Worth 2003, pet. denied); *Sink v. Progressive County Mut. Ins. Co.*, 47 S.W.3d 715, 718 rev’d on other grounds 107 S.W.3d 547.

if the insurer establishes the applicability of an exclusion does the burden then shift back to the insured to establish coverage under an exception to the exclusion.¹¹

Here, it is undisputed that the unexpected free fall of the piling was a covered event under the Policy.¹² Despite this recognition that coverage existed for the claim, and without any demonstration by the Underwriters that weather stand-by charges were excluded under the Policy via clear and unambiguous language, the court below erroneously shifted the burden to OSFI to establish that coverage existed for weather stand-by charges that were necessarily incurred and duly justified.¹³ The evidence adduced by OSFI established that the weather stand-by charges were necessarily incurred and there is no doubt they were incurred as the direct result of the unexpected free fall of the piling – which was a covered event under the Policy. And by not requiring the Underwriters to establish that the weather stand-by charges were excluded under the Policy once OSFI established that they were necessarily incurred and duly justified as part of making repairs to an indisputably covered event, the court below inappropriately shifted the burden on coverage.

By running afoul of this principle, which is entrenched in Texas insurance law, the court below created a rift between prior opinions issued by this Court and other intermediate courts of appeals. Therefore, jurisdiction for OSFI's appeal exists under §22.001(a)(2) of the Texas Government Code.

¹¹ *Sink*, 47 S.W.3d at 718

¹² *Wellington Underwriting*, 267 S.W.3d at 281

¹³ *Id.* at 283-288

D. By Shifting the Burden to OSFI to Establish Coverage, the Court Below Failed to Require the Underwriters to Demonstrate an Exclusion Precluded Coverage of Weather Stand-by Charges.

This Court has jurisdiction over OSFI's appeal because the Fourteenth Court of Appeals' decision conflicts with the concrete principle that an exclusion from coverage must be expressed in clear and unambiguous written language.

All-risk policies create a special type of coverage.¹⁴ Because of their unique nature, all-risk policies provide coverage for *all* losses of a fortuitous nature that are not *expressly* excluded in the policy.¹⁵ COUCH ON INSURANCE made the following observation with respect to all-risk policies:¹⁶

An "all-risk" policy creates coverage of a type not ordinarily present under other types of insurance, and recovery is allowed for fortuitous losses unless the loss is excluded by a specific policy provision: the effect of such a policy is to broaden coverage and a fortuitous event is one which to the knowledge of the parties, is dependent upon chance.

Additionally, any attempt to exclude coverage must be expressed in clear and unambiguous language.¹⁷

Just as it is undisputed that a covered event occurred, it is undisputed that the Policy in question – an "all-risk" policy – contains no clear, unambiguous and express language excluding coverage for weather stand-by charges. Despite the absence of any such exclusionary language, the court below erroneously concluded that weather stand-by charges were not covered. By finding an exclusion where there was no clear and

¹⁴ *Miles v. Royal Indemnity Co.*, 589 S.W.2d 725, 729 (Tex.Civ.App. – Corpus Christi 1979, writ ref'd n.r.e.)

¹⁵ *Muniz v. State Farm Lloyds*, 974 S.W.2d 229, 234 (Tex.App. – San Antonio 1998, no writ) emphasis supplied; *Brownsville Fabrics, Inc. v. Gulf Ins. Co.*, 550 S.W.2d 332, 336-37 (Tex.Civ.App. – Corpus Christi 1977, writ ref'd n.r.e.)

¹⁶ COUCH ON INSURANCE, §148.50, at 148-87 (3d ed. 1998)

¹⁷ *Nat'l Union Fire Ins. Co. v. Hudson Energy Co.*, 811 S.W.2d 552, 555 (Tex. 1991); *State Farm Fire & Cas. Co. v. Reed*, 873 S.W.2d 698, 699 (Tex. 1994)

unambiguous language, the court below's opinion is in conflict with opinions issued by this Court and other intermediate courts of appeals.

II. THE COURT SHOULD EXERCISE JURISDICTION OVER THIS CASE BECAUSE IT HAS BROAD-REACHING IMPLICATIONS IN THE INTERPRETATION OF EXCLUSIONS FROM COVERAGE IN INSURANCE POLICIES.

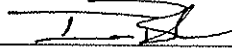
In addition to having jurisdiction over OSFI's appeal under §22.001(a)(2) of the Texas Government Code, the Court should exercise its jurisdiction over this case because the Fourteenth Court of Appeals' improper application of well-established principles regarding the interpretation and construction of insurance policies – namely exclusions from coverage – will have a far-reaching and heavy impact on the jurisprudence in the State of Texas.

CONCLUSION

Because the opinion issued by the Fourteenth Court of Appeals conflicts with prior opinions issued by this Court and other intermediate courts of appeals, this Court has jurisdiction over OSFI's appeal under §22.001(a)(2) of the Texas Government Code. Additionally, OSFI requests that the Court exercise its jurisdiction over this case because the Fourteenth Court of Appeals' erroneous decision will have a far-reaching and negative impact on the interpretation of insurance policies – namely exclusions from coverage – in Texas jurisprudence.

Respectfully submitted,

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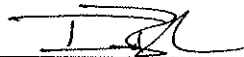
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CERTIFICATE OF SERVICE

I certify that a true and correct copy of Offshore Specialty Fabricators, Inc.'s Reply to Wellington Underwriting Agencies, Ltd. Response to Petition for Review was served upon all counsel of record in accordance with the Texas Rules of Appellate Procedure on March 5, 2009.



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