No. ______

In the Supreme Court of the United States

IRMA MIRANDA-MONDRAGON,
Petitioner,
v.

NAUTILUS INSURANCE COMPANY,
Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Did Respondent have the duty to defend its insured, Darwin Vargas d/b/a Houston Star Security Patrol, under its existing insurance policy that it had with Respondent in an action brought against its insured by Petitioner?

2. Whether the claim filed by Petitioner in this matter is covered under the policy that Respondent provided its insured, and as a result is not barred by the exclusion clause contained in the policy?

3. Whether Petitioner raised several genuine issues of material facts in dispute, and as a result both the trial court, and the court of appeals committed gross error in granting and affirming Respondent's Motion for Summary Judgement?

4. Whether Petitioner is entitled to recover its claim against Respondent, including its judgment plus pre, and post judgment interests, attorney fees and costs?

PARTIES TO THE PROCEEDINGS

Petitioner, Irma Miranda-Mondragon, was the Appellant in the court below. Respondent, Nautilus Insurance Company, was the Appellee in the court below.

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PETITION FOR WRIT OF CERTIORARI

Petitioner, Irma Miranda-Mondragon, respectfully prays that a writ of certiorari issue to review the judgment below.

OPINION BELOW

The opinion of the Federal Court of Appeals for the Fifth Circuit appears at appendix A to this petition. The court's opinion will not be published.

JURISDICTION

The Federal Court of Appeals for the Fifth Circuit issued its decision on October 20, 2017. A copy is attached at appendix A. The Federal Court of Appeals for the Fifth Circuit entered final judgment on the appeal on October 20, 2017. A copy of the judgment is attached at appendix A. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254.1

Jurisdiction of the court of first instance is 28 U.S.C. § 1332.

INTRODUCTION

On or about October 26, 2013, Petitioner, was working as a waitress at a nightclub, **HUETAMO NITE CLUB**, located at 1810 Ojeman, Houston, Texas 77080, when various armed individuals entered the nightclub and started shooting at the customers and employees of the nightclub. As a result of that incident, she was shot and suffered severe injuries in her chest area and was transported by ambulance to Ben Taub Hospital, in Houston, Texas, where she was hospitalized for a period of time, and received extensive medical treatment.

Petitioner initially filed her case with the state court in Harris County, Texas in cause number 2014-05887 and alleged that Defendants, in that case, **GUSTAVO ALVAREZ**, **an Individual, and HUETAMO ENTERPRISES, INC.,** were all negligent and violated the duty that they owed the Petitioner to exercise ordinary care that reasonable and prudent employer would. Petitioner subsequently amended her Petition, and included Respondent's insured, **HOUSTON STAR SECURITY PATROL,** as Co-Defendant, and alleged that Respondent's insured was also negligent in not providing adequate security for Petitioner, to avoid her having suffered her injuries. Further, that Defendants and Co-Defendant, **HOUSTON STAR SECURITY PATROL**, were negligent in at least the following respects:

1. In failing to provide a safe and secure environment for Petitioner.

2. In failing to provide adequate security for Petitioner.

3. In failing to provide adequate protection for Petitioner.

Further, that each and all of the foregoing acts, of all of the Defendants both of omission and commission, were negligent and constituted negligence, and were each and all, jointly and severally, separately and concurrently, a direct and proximate cause of the incident made the basis of this suit, and the injuries suffered by Petitioner as a result thereof. Further, Petitioner has incurred damages, loss wages and medical bills, which have to be paid.

On December 16, 2015, Petitioner, filed her motion for default judgment against, **HOUSTON STAR SECURITY PATROL,** in the state case and delivered a copy of the motion to Defendant.

On June 10, 2016, Petitioner, **IRMA MIRANDA-MONDRAGON,** properly secured a default judgment on, **HOUSTON STAR SECURITY PATROL** in cause number 2014-05887. **(APP.21D)**

On July 21, 2016, Petitioner, **IRMA MIRANDA-MONDRAGON,** notified Respondent, **NAUTILUS INSURANCE COMPANY,** of the properly secured default judgment against its insured **HOUSTON STAR SECURITY PATROL,** and Petitioner set up a claim with Respondent.

The reason for setting up the claim with Respondent was because Houston Star Security Patrol had an insurance policy number NN365860 with Respondent on the date of the incident.

STATEMENT OF THE CASE

On or about October 26, 2013, Petitioner, was working as a waitress at a nightclub, **HUETAMO NITE CLUB**, located at 1810 Ojeman, Houston, Texas 77080, when various armed individuals entered the nightclub and started shooting at the customers and employees of the nightclub. As a result of that incident, she was shot and suffered severe injuries in her chest area and was transported by ambulance to Ben Taub Hospital, in Houston, Texas, where she was hospitalized for a period of time, and received extensive medical treatment.

Petitioner, subsequently filed her cause of action against **GUSTAVO ALVAREZ**, **an Individual, and HUETAMO ENTERPRISES, INC.,** in cause number 2014-05887 with the 127th Judicial District Court, Harris County, Texas.

In that case Petitioner alleged that Defendants, **GUSTAVO ALVAREZ**, **an Individual, and HUETAMO ENTERPRISES, INC.,** were all negligent and violated the duty that they owed the Petitioner to exercise ordinary care that reasonable and prudent employer would.

Petitioner subsequently amended her Petition, and included Co-Defendant in that case, **HOUSTON STAR SECURITY PATROL,** and alleged that the company was also negligent because it failed to provide adequate security for Petitioner, and that led to her injuries. Further, that Defendants and Co-Defendant, **HOUSTON STAR SECURITY PATROL**, were negligent in at least the following respects:

1. In failing to provide a safe and secure environment for Petitioner.

2. In failing to provide adequate security for Petitioner.

3. In failing to provide adequate protection for Petitioner.

Further, that each and all of the foregoing acts, of all of the Defendants both of omission and commission, were negligent and constituted negligence, and were each and all, jointly and severally, separately and concurrently, a direct and proximate cause of the incident made the basis of this suit, and the injuries suffered by Petitioner as a result thereof. Also, Petitioner has incurred damages, loss wages and medical bills.

That on December 16, 2015, Petitioner, **IRMA MIRANDA-MONDRAGON,** filed her motion for default judgment against, **HOUSTON STAR SECURITY PATROL,** in the state case and delivered a copy of the motion to Defendant.

On June 10, 2016, Petitioner, **IRMA MIRANDA-MONDRAGON,** properly secured a default judgment on, **HOUSTON STAR SECURITY PATROL** in cause number 2014-05887. **(APP.21D)**

On July 21, 2016, Petitioner, **IRMA MIRANDA-MONDRAGON,** notified Respondent, **NAUTILUS INSURANCE COMPANY,** of the properly secured default judgment against its insured, **HOUSTON STAR SECURITY PATROL,** and Petitioner set up a claim with Respondent.

On September 25, 2016 Respondent filed its Complaint for Declaratory Judgment against Petitioner.

The reason for setting up the claim with Respondent was because Houston Star Security Patrol had an insurance policy number NN365860 with Respondent, which provides in pertinent part the following:

COMMERCIAL GENERAL LIABILITY

THE ENDORSMENT CHANGES THE POLICY, PLEASE READ IT CAREFULLY

COVERAGE EXTENSION-SECURITY AND PATROL AGENCY PROFESSIONAL LIABILITY

This endorsement modifies insurance provided under the following:

COMMERCIAL GENERAL LIABILITY COVERAGE PART

[A] The following is added to 1.**a. Insuring Agreement of Section I – Coverage A-Bodily Injury And Property Damage Liability:**

We will also pay those sums that the insured becomes legally obligated to pay as damages because of the rendering of or failure to render "professional services" in providing "security and patrol agency services."

[B] With respect to the coverage provided by this endorsement, the following exclusions are added to **2. Exclusions** of **Section I – Coverage A – Bodily Injury And Property Damage Liability, Coverage B – Personal And Advertising Injury Liability** and **Coverage C – Medical Payments:**

This insurance does not apply to "incidents" arising out of:

> Any "professional services" other than those provided for "security and patrol agency services;"
>
> "Bodily injury," "property damage," "personal and advertising injury," or medical payments covered under the ISO Commercial General Liability Coverage Form, whether or not such coverage is valid and collectible.
>
> **However, this exclusion does not apply to "bodily injury" or "property damage" arising out of a negligent act, error, or omission in the rendering of or failure to render "professional services" in providing "security patrol and agency services;"**

On or about December 22, 2016, Petitioner filed her Motion for Summary Judgment against Respondent, with the federal district court and stated her position that there are no material facts in dispute, and that she is entitled to Summary Judgment against Respondent.

On or about January 13, 2017, Respondent filed its Motion for Summary Judgment against Petitioner, with the trial court and alleged there are no issues of material facts in dispute, and that Respondent was entitled to Summary Judgment.

On or about March 10, 2017, Petitioner filed her Response In Opposition to Respondent's Motion, and raised the following issues as material issues of facts in dispute.

1. Whether or not Co-Defendant, **DARWIN VARGAS D/B/A HOUSTON STAR SECURITY PATROL,** notified Plaintiff, **NAUTILUS INSURANCE COMPANY,** of the lawsuit which Defendant filed against him, and his company in state court in cause number: 2014-05887?

2. Whether or not Plaintiff, **NAUTILUS INSURANCE COMPANY,** informed Co-Defendant, **DARWIN VARGAS D/B/A HOUSTON STAR SECURITY PATROL**, that he was required to notify Plaintiff of any lawsuit which was filed or pending against him, and his company when he purchased his insurance policy from Plaintiff?

3. Whether or not Plaintiff, **NAUTILUS INSURANCE COMPANY**, informed Co-Defendant, **DARWIN VARGAS D/B/A HOUSTON STAR SECURITY PATROL**, that anytime a lawsuit was filed against him, and his company, the Plaintiff in that lawsuit was required to notify the Plaintiff herein?

4. Whether or not Defendant's counsel notified Plaintiff of the lawsuit when he discovered that Plaintiff was Co-Defendant, **DARWIN VARGAS D/B/A HOUSTON STAR SECURITY PATROL**, insurance company?

5. Whether or not at the time that Plaintiff, **NAUTILUS INSURANCE COMPANY** agreed to provide insurance coverage for Co-Defendant, **DARWIN VARGAS D/B/A HOUSTON STAR SECURITY PATROL,** it

knew or should have known that Co-Defendant had a lawsuit on file against him and his company, however, ignored and failed to offer representation to him?

6. Whether or not on the date that Plaintiff, **NAUTILUS INSURANCE COMPANY**, became the insurance company for Co-Defendant, **DARWIN VARGAS D/B/A HOUSTON STAR SECURITY PATROL**, its representative inquired from him whether or not he had a pending lawsuit against him and his company?

7. Whether or not Defendant's counsel immediately notified Plaintiff when he discovered the Plaintiff was Co-Defendant, **DARWIN VARGAS D/B/A HOUSTON STAR SECURITY PATROL**, insurance company?

8. Has Plaintiff provided this honorable court sufficient proof that Co-Defendant was made aware by Plaintiff that he had to notify Plaintiff of the pending lawsuit filed against him in the state court in cause number:2014-05887?

9. Considering that the lawsuit filed by Defendant against Co-Defendant in the state court in cause number;2014-05887 was a matter of public record, was Plaintiff put on notice then when it initially provided insurance service to Co-Defendant?

10. Has Plaintiff provided this honorable court any proof that it was not aware of the lawsuit filed by Defendant against Co-Defendant?

On or about March 15, 2017, Respondent filed its Response to Petitioner's Motion for Summary Judgment.

This matter was set for hearing on March 17, 2017, and following that hearing, the trial judge denied Petitioner's Motion, and granted Respondent's Motion for Summary Judgment against Petitioner. **(APP.6B), (APP.8C)**

On April 12, 2017, Petitioner filed her Notice of Appeal thereby appealing that decision to the United States Court of Appeals for the Fifth Circuit.

On October 20, 2017, the United States Court of Appeals for the Fifth Circuit issued its ruling wherein that court affirmed the ruling of the trial court.**(APP.1A)**

On December 21, 2017, Petitioner filed her Application for Extension of Time to file her Petition for Writ of Certiorari, and the same was granted, and Petitioner was granted until February 20, 2018, to file her Petition.

REASONS FOR GRANTING THE PETITION

1. Did Respondent have the duty to defend its insured, Darwin Vargas d/b/a Houston Star Security Patrol, under its existing insurance policy that it had with Respondent in an action brought against its insured by Petitioner?

It is the position of Petitioner that this honorable court should grant her Petition for Writ of Certiorari. In support of her position Petitioner cites the following cases and respectfully requests that The Supreme Court adopt the reasons and conclusions reached by the various courts in the following cases.

In **WALKER v. LUMBERMENS MUTUAL CASUALTY COMPANY** 491 S.W.2d 696 (1973). Plaintiff, Bill Walker, sued his insurer, Lumbermens Mutual Casualty Company, to recover benefits under a Texas Standard Homeowner's policy. The case was tried without a jury on stipulated facts. The trial court ruled that Plaintiff's claim was not covered under Section II, Coverage D of the policy...Id at 697.

The appropriate provisions of the policy are as follows: "SECTION II-LIABILITY SECTION COVERAGE D-PERSONAL LIABILITY. To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury or property damage, and the company shall defend any suit against the insure alleging such bodily injury or property damage…

EXCLUSION-COVERAGE D shall not apply:

*5.*to bodily injury or property damage caused intentionally by or at the direction of the Insured;

COVERAGE F-PHYSICAL DAMAGE TO PROPERTY OF OTHERS

To pay for loss of property of others caused by an Insured.' * , nor in any event shall the company's liability exceed the Limit of Liability shown on Page 1.

EXCLUSION-COVERAGE F shall not apply to:

3. loss caused intentionally by an Insured over the age of 12 years;" Id. at 697

The policy contained an "Amendatory Endorsement" to Section II which provided: "INSURED

The unqualified word 'Insured' includes (a) the Named Insured and (b,) if residents of his household, his spouse, the relatives of either, and any other person under the age of 21 in the care of an Insured. * * *Id at 698

The court therein reasons as follows:

"It has been held that an exclusion provision similar to the one involved here is reasonably understood as designed to prevent indemnifying one against loss from his own wrongful acts and cannot be construed to exclude coverage for the willful acts of another in the absence of a clear expression showing such intent. Western Casualty & Surety Co. v. Aponaug Mfg. Co., *5* Cir., 197 F.2d 673, 674 (5th Cir. 1952); Morgan v. Greater New York Taxpayers Mut. Ins. Ass'n, 305 N.Y. 23, 112 N.E. 2d 273, 275. This construction is further supported by decisions which hold that a policy extending coverage to several persons creates several obligations on the part of the insurer, so that a particular insured is not precluded from recovering merely because the claim of another insured is barred under the terms of an exclusion provision. Hoyt v. New Hampshire Fire Ins. Co., 92 N.H. 242,29 a.2d 121, 123 148 A.L.R 484 (N.H. 1942); Wening v. Glens Falls Indemnity Co., 294 N.Y. 195, 61 N.E.2d *442,444-445;* Pratt v. Hanover Fire Ins. Co., 50 R.I. 203, 146 A. 763,764,765 (R.I. 1929). Id at 698-699

Further, in the case of:

SOUTHERN FARM BUR CAS. INS. Co v. ADAMS 570 S.W.2d 567. This is a suit for declaratory judgment. Suit was brought by James R. Adams and Donald G. Adams, hereinafter called "plaintiffs", against Southern Farm Bureau Casualty Insurance company, hereinafter called "defendant" , to determine whether or not defendant, under an existing insurance policy, had the duty to defend plaintiffs in an action brought against them by a third person. Both parties filed motions for summary judgment. Plaintiffs' motion was granted and defendant's motion was denied. Judgment was rendered which decreed that defendant was required to defend plaintiffs in the suit brought against them. Defendant has appealed. Id at 568

Defendant issued a "Farmer's Comprehensive Personal Insurance" policy to plaintiffs on February 17, 1974, wherein it contracted to pay on behalf of plaintiffs all sums which plaintiffs shall become legally obligated to pay as damages because of bodily injury caused by an occurrence during the policy period, and further contracted with plaintiffs to defend any suit against them by a third person where a recovery is sought against them because of bodily injuries allegedly sustained by such a person. The policy had numerous exclusions from coverage, including among others: "This cover does not apply:…

(c) to bodily injury or property damage arising out of the ownership, maintenance, operation, use, loading or unloading of: Id at 568

(1) any aircraft;

** ** * ***** * *

(n) to property damage arising out of any substance released or discharged from any aircraft. Id at *569*

Since the policy here involved is a policy of "Farmer's Comprehensive Personal Insurance", it is reasonable to conclude that it was purchased and sold to afford comprehensive insurance coverage against liability of the insured in their farming business, and that the exclusion was inserted in the policy to exclude from coverage liability arising out of personal use by them of aircraft, since the policy was designated to afford coverage for liability arising out of farming operations as opposed to liability arising from personal pursuits of the insureds. This view is supported by the decision in Heyward v. Republic Nat. Life Ins. Co., *527* S.W.2d 807 (Tex.Civ.App.-San Antonio 1975), affirmed in *536* S.W.2d 549 (Tex.Sup.1976). There, Heyward had a policy of accidental death insurance which had an exclusion that provided that benefits would not be payable for any loss to which a contributing cause is (e) participation in or as the result of the commission of felonies act. . . ."

Heyward was murdered, the company denied coverage, and Heyward's widow sued. The insurance company contended that since Heyward was intentionally killed by another that he died as the result of a felonious act and the exclusion barred recovery. The Court of Civil Appeals held at *527* S.W.2d 812: ". . . We do not agree that the slayer is participating in or committing a felonious act is not enough in order for such exclusion to be applicable, the insured must be participating in or committing a felonious act. .. The Supreme Court agreed.

The rule of Heyward, that exclusions should be construed to speak to acts of an insured and not to acts of third parties, would dictate that the exclusion in the policy in question in this appeal should be construed to mean that plaintiffs (or their employees) must have personally used the airplane in question in order for the exclusion to exempt defendant from liability to defend plaintiffs in the Hedke suit. [8] Moreover, if exclusion (c) is construed as contended, that is, that bodily injury or property damage arising out of the use of an aircraft is excluded from coverage regardless of whether an insured or third party is personally using the aircraft, then exclusion (n) is rendered meaningless, for everything intended to be excluded by exclusion (n) would have been already excluded by exclusion (c) This of course is an impermissible interpretation. See <u>Liberty Mutual Insurance Company v. American Employers Insurance Company</u> *556* S.W.2d 242 (Tex.Sup.1977). However, the construction contended for by plaintiffs (the insureds) reconciles these two exclusions-exclusion (n) means that there is no coverage for property damage arising from aerial spraying, but exclusion(c) means there is coverage for bodily injury arising from aerial spraying at least when performed, as here, by an independent contractor. Id at 571

It is Petitioner's position that under the existing policy that Respondent had provided its insured, Houston Star Security Patrol, Respondent had the absolute duty to defend its insured. On the date of the incident, Respondent had provided an insurance policy to its insured, which clearly shows Respondent's obligation to defend its insured should a cause of action, such as the one instituted by Petitioner against its insured.

The insured was properly served, and there is nothing in the records from Respondent's insured that it failed or ignored to notify Respondent of the lawsuit filed by Petitioner against Respondent's insured.

2. Whether the claim filed by Petitioner in this matter is covered under the policy that Respondent provided its insured, and as a result is not barred by the exclusion clause contained in the policy?

It is the position of Petitioner that the policy that Respondent issued to its insured clearly indicates that the same covers the claim that Petitioner submitted to Respondent.

Whereas Respondent's insurance policy contains an exclusion clause, it clearly states that, "however, this exclusion does not apply to "bodily injury" or "property damage" arising out of a negligent act, error, or omission in the rendering of or failure to render "professional services" in providing "security patrol and agency services".

In support of her position, Petitioner presents the reasonings and rulings reached by the courts in the following cases:

<u>GUARANTY NAT, INS. CO. v. NORTH RIVER INS. CO.</u> 909 F.2d 133 (5th Cir. 1990)

This case arises out of a psychiatric patient's suicide at Texarkana, Texas, Memorial Hospital. The hospital's liability is established. The district court resolved a dispute between the hospital's primary insurers and the hospital's excess liability insurers by holding that an exclusion in the hospital's primary comprehensive general liability policy did not apply to preclude coverage under that policy and that the single claim limit of liability in the hospital's primary professional malpractice policy applied… Id at 134. The North River policy provided impenitent part that north river would pay on behalf of the hospital all sums which the hospital shall become legally obligated to pay as damages because … of bodily injury… to which this insurance applies..." The policy also contains a malpractice and professional services exclusions that excludes coverage for bodily injury that occurs due to… The rendering of or failure to render... any service or treatment conductive to health or of a professional nature..." North River claims this exclusion exempts North River from any responsibility for the judgment against the hospital. Guaranty and Ranger, however assert that North River cannot avoid liability under this exclusion because the hospital's liability was found in part on the hospital's failure to safeguard Wagner's window and the hospital's failure adequately to staff the psychiatric ward. Guaranty and Ranger claim that these errors did not involve professional services excluded under the professional services provisions.

We interpret the North River exclusion to avoid coverage only for actions taken on behalf of a patient that are based on professional medical judgment. The hospital's liability in this case, however, was founded in part on its negligent failure to maintain Wagner's window in such a manner as to prevent her from committing suicide through the window. The hospital's error was not that it decided as a matter of professional judgment not to protect the open unit patients from perils posed by the windows. Instead the error was that once the hospital decided to provide such protection it did not do so adequately... Id at 135-136

We recognize that some courts have construed professional services exclusions broadly in holding that the exclusions precluded coverage. For example in Antles v. Aetna Casualty and Sur. Co., 221 Cal. App.2d 438, 34 Cal.Rptr. 508 (1963) the court held that a professional services exclusion precluded coverage under a chiropractor's general liability policy. The Chiropractor's liability stemmed from an accident in which a negligently-mounted heat lamp fell on a patient. The court held that the failure of the heat lamp occurred during professional services and therefore was within terms of the exclusions. We are convinced, however, that the better authority supports our interpretation of the North River Exclusion. Id at 136-137

It is undisputed that on the date of the incident, HOUSTON STAR SECURITY PATROL, was insured by Respondent, NAUTILUS INSURANCE COMPANY, under policy number NN365860.

It is Petitioner's position that it is also undisputed that on the date of the incident made the basis for this cause of action, HOUSTON STAR SECURITY

PATROL, had a policy with Respondent, and that the same was valid, in effect, and has not been cancelled.

It is also Petitioner's position that the specific provisions in the insurance policy that HOUSTON STAR SECURITY PATROL, had with Respondent provides that there was coverage for the incident of October 26, 2013, which makes Respondent liable and responsible for the payment of the Default judgment which Petitioner secured against HOUSTON STAR SECURITY PATROL.

In HOYT et al. v. NEW HAMPSHIRE FIRE INS. CO. 92 N.H. 242 (1942)29A.2d 121, 148 A.L.R. 484

Actions in assumpsit by Ernest E. Hoyt and others against New Hampshire Fire Insurance Company, Springfield Fire & Marine Insurance Company, the Boston Insurance Company, the American Eagle Fire Insurance Company, the Niagara Fire Insurance Company, and against the Franklin Fire Insurance Company to recover on fire policies issued by each of the defendants, and covering property owned by the plaintiffs as a tenants in common. A question of law was transferred by trial court in advance of trial. Id at 1.

The court in that case reasoned that a reasonable person in construing an insurance contract, the test is not what the insurance company intended the words of the policy to mean but what a reasonable person in the position of the insured would have understood them to mean. Id at 1. Further, that***Whether the rights of obliges are joint or several is a question of construction (1 Williston, Con., §325), and in construing an insurance contract the test is not what the insurance company intended the words of the policy to mean but what a reasonable person in the position of the insured would have understood them to mean. Id at 2. Watson v. Firemen's Insurance Co., 83 N.H. 200, 202, 140 A. 169 (N.H. 1928); Cartier v. Lumbermen's Mut. Casualty Co., 84 N.H. 526,527, 153 A. 6 (N.H. 1931); Studley Box, etc., Co. v. National Fire Insurance Co., 85 N.H. 96, 101, 154 a. 337, 75 A.L.R. 248; Duhaime v. Prudential Insurance Co., 86 N.H. 307, 308, 167 A. 269 (N.H. 1933); Trepanier v. Mercantile Insurance Co., 88 N.H. 118, 122, 184 A. 866, 185 A. 656 (N.H. 1936); Penn, etc., Ins. Co. v. Kelly, 88 N.H. 351, 354, 189 A. 345; Merchants, etc., Co. v. Lambert, 90 N.H. 507, 510, 11 A.2d 361, 127 A.L.R. 483 (N.H. 1940).

The ordinary person owning an undivided interest in property, not versed in the nice distinctions of insurance law, would naturally suppose that his individual interest in the property was covered by a policy which named him without qualification as one of the persons insured. And the fact that under such circumstances the insurance company may have good reasons for preferring to issue a joint policy (see Monaghan v. Agricultural F. Insurance Co., 299 Mass. 601, 604, 13 N.E. 423) is unimportant unless those reasons were disclosed. Id at 3.

In MORGAN v. GREATER NEW YORK TAXPAYERS MUT. INS. ASS'N 305 N.Y. 243 (1953). The facts, which are not in dispute, are as follows: Cronin and Leventhal owned and operated the Concourse Residence Club. Plaintiff was their tenant and, while on the named premises, sustained personal injuries during an assault upon his person by Leventhal. Cronin was in Florida at that time and it is not contended that the assault was committed at his direction. Plaintiff instituted an action to recover damages against Cronin and Leventhal 'individually and as co-partners doing business under the name style of Concourse Residence Club'. Defendant who had issued a public liability policy to Cronin and Leventhal, as individuals, was given notice of the action but refused to defend in their behalf. Id at 2.

The court reasoned that the policy involved here is an 'Owners, Landlords and Tenants Public Liability Policy'. The insuring agreements provide, 'subject to *** exclusions, conditions and other terms of this policy', the defendant shall pay on behalf of the Assured all sums which the Assured shall become obligated to pay by reason of the liability imposed upon him by law for damages***because of bodily injury*** *247 sustained by any person ***caused by accident, arising out of the care, maintenance or operation of the premises herein insured.' It is further provided the 'Assault and battery shall be deemed an accident unless committed by or at the direction of the Assured.' (Emphasis supplied.) The policy then recites that: 'The foregoing agreements are subject to the following conditions:*** Id at 2.

'Our guide must be the reasonable expectation and purpose of the ordinary businessman when making an insurance contract***.' Burr v. Commercial Travelers Mut. Accident Ass'n, 295 N.Y. 294, 301, 67 N.E.2d 248, 251, 166 A.L.R. 462. 'The language employed in the contract of insurance must be given its ordinary meaning, such as the average policyholder of ordinary intelligence as well as the insurer, would attach to it.' Abrams v. Great American Ins. Co., 269 N.Y. 908 92, 199

N.E. 15, 16. We believe that the meaning which we attribute to the exclusory v. Great American Ins. Co., 269 N.Y. 90, defendant intended the exclusory provision to mean more than that, i.e., to mean that there is no obligation to indemnify an assured for liability resulting from an assault committed by another assured, it should have made that intention known. Id at 3.

The 'Definitions' sections, by assigning a broad meaning to the term 'Assured', extends coverage to various persons in addition to the named assured.' That section which might be termed an "additional assured" provision serves as an inducement *249 to purchase insurance to one contemplating taking out a liability policy, by affording coverage, without added premium, to others in addition to the applicant. To hold that such a provision, purporting as it does to broaden coverage by extending it to additional assureds, works a reduction in the coverage which would be afforded to the named assured in the absence of such provision is not in harmony with the true, beneficial purpose of the provision. In Wenig v. Glens Falls Indem. Co., 294 N.Y. 195, 201, 61 N.E.2d 442, 445 (N.Y. 1945), we discussed a somewhat similar provision and said (Lehman, Ch. J.): 'That liability of the insurance company upon its promise to insure the 'named assured' is neither extended nor limited by the fact that under the terms of the policy it assumed an obligation also to insure the 'additional assured' against liability for damages for which he might become liable.' (Emphasis supplied.)

The proper view of the policy under consideration is that by it the defendant has undertaken separate and distinct obligations to the various assureds, named and additional, and where liability is imposed upon one of the assured for an assault by another assured in which he took no part, the result should be no different for that which would obtain where the assault was committed by a person who is not an assured e. g., an employee. Wenig v. Glens Falls Indem.Co., 294 N.Y. 195 (1945) 61 N.E.2d 442

The plaintiff, Ray Wenig, was struck on December 18, 1934, by an automobile owned by Emily V. Baker and operated, with her consent, by her husband, Thomas F. Baker. Mrs. Wenig brought an action in December, 1936, against Emily V. Baker and Thomas F. Baker to recover damages for the injuries which she sustained in the collision; and her husband, Rudolf Wenig, joined in the action as plaintiff to recover damages arising from the loss of his wife's services.***

***In its second defense the defendant pleaded: 'That the aforesaid Emily V. Baker and Thomas F. Baker, failed to give this defendant immediate written notice of the accident referred to in the complaint herein, and upon which this action ***444 is based, and failed to give this defendant any notice thereof until on or about January 4th, 1935, and not until after the assumption of liability and settlement of the claim of the plaintiffs as hereinabove set forth.'

The purport and effect of words and acts often depend upon their setting. Words and acts must be given effect in accordance with the meaning which they then convey to reasonable men. No rigid formula will measure or determine that.

*** Nothing that she did could affect her right or the right of the insurance company to contest a claim against her or embarrass the company in the defense of such a claim. There was no breach by her of any express condition or warranty annexed under the terms of the policy to the obligation of the company to insure her.

See also Coleman v. New Amsterdam Casualty Co., 247 N.Y. 271, 160 N.E. 367, 72 A.L.R. 143; Weatherwax v. Royal Indemnity Co., 250 N.Y. 281 165 N.E. 293; Fox v. Employers' Liability Assur. Corp., Ltd., of London, England, 243 App.Div.325, 276 N.Y.S. 917; American Automobile Ins. Co. v. Fidelity & Casualty Co., 159 Md. 631, 152 A. 523; Brodsky v. Motorists Casualty Ins. Co., 112 N.J.L. 211, 170 A. 243, Affirmed 114 N.J.L. 154, 176 A. 143 (N.J. 1935); Kindervater v. Motorists' Casualty Ins. Co., 120 N.J.L. 373, 199 A. 606 (N.J. 1938); American Automobile Ins. Co. v. Fidelity & Casualty Co., 159 Md. 631, 152 A. 523, supra; Brodsky v. Motorists Casualty Ins. Co., 112 N.J.L. 211, 170 A 243, affirmed 114 N.J.L. 154, 176 A. 143

3. Whether Petitioner raised several genuine issues of material facts in dispute, and as a result both the trial court, and the court of appeals committed gross error in granting and affirming Respondent's Motion for Summary Judgement?

In her response to the Motion for Summary Judgment, Petitioner raised the following issues:

FACTS IN DISPUTE

Whether or not, **DARWIN VARGAS D/B/A HOUSTON STAR SECURITY PATROL,** notified Respondent, **NAUTILUS INSURANCE COMPANY,** of the lawsuit which Petitioner filed against it, and his company in state court in cause number: 2014-05887?

Whether or not Respondent, **NAUTILUS INSURANCE COMPANY,** informed Respondent, **DARWIN VARGAS D/B/A HOUSTON STAR SECURITY PATROL,** that it was required to notify Respondent of any lawsuit which was filed or pending against it, and its company when he purchased the insurance policy from Respondent?

Whether or not Respondent, **NAUTILUS INSURANCE COMPANY,** informed , **DARWIN VARGAS D/B/AHOUSTONSTAR SECURITY PATROL,** that anytime a lawsuit was filed against him, and his company, the Plaintiff in that lawsuit was required to notify the Respondent herein?

Whether or not Petitioner's counsel notified Respondent of the lawsuit when he discovered that Respondent was **DARWIN VARGAS *D/B/A* HOUSTON STAR SECURITY PATROL** insurance company?

Whether or not at the time that Respondent, **NAUTILUS INSURANCE COMPANY** agreed to provide insurance coverage for **DARWIN VARGAS D/B/A HOUSTON STAR SECURITY PATROL,** it knew or should have known that its insured had a lawsuit filed against it, however ignored and failed to offer representation to it?

Whether or not on the date that Respondent, **NAUTILUS INSURANCE COMPANY,** became the insurance company for **DARWIN VARGAS *D/B/A* HOUSTON STAR SECURITY PATROL,** its representatives inquired from him whether or not he had a pending lawsuit against him and his company?

Whether or not Petitioner's counsel immediately notified Respondent when he discovered that Respondent was **DARWIN VARGAS D/B/A HOUSTON STAR SECURITY PATROL** insurance company?

Has Respondent provided this honorable court sufficient proof that **DARWIN VARGAS D/B/A HOUSTON STAR SECURITY PATROL** was made aware by Respondent that he had to notify Respondent of the pending lawsuit filed against his company in the state court in cause number: 2014-05887?

Considering that the lawsuit filed by Petitioner against **DARWIN VARGAS D/B/A HOUSTON STAR SECURITY PATROL** in the state court in cause number: 2014-05887 was a matter of public record, was Respondent put on notice then when it initially provided insurance service to **DARWIN VARGAS D/B/A HOUSTON STAR SECURITY PATROL**?

Has Respondent provided this honorable court any proof that it was not aware of the lawsuit filed by Petitioner against **DARWIN VARGAS D/B/A HOUSTON STAR SECURITY PATROL**?

Rule *56* of the Federal Rules of Civil Procedures:

Pursuant to Rule 56 of the Federal Rules of Civil Procedure which governs SUMMARY JUDGMENT- A party may move for summary judgment, identifying each claim or defense — or the part of each claim or defense — on which summary judgment is sought. The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law. The court should state on the record the reasons for granting or denying the motion…

See also Rule 166a(c), of the Texas Rules of Civil Procedures which states: a Movant must establish that there is no genuine issue of material fact so that the Movant is entitled to judgment as a matter of law. TEX. R. CIV. P. 166a(c); Nixon v. Mr. Prop. Mgmt. Co., 690 S.W. 2d 546, 548 (Tex. 1985); Tesoro Petroleum Corp. v. Nabors Drilling USA. Inc., 106 S.W. 3d 118, 124 (Tex.App. Houston [Dist] 2002. pet denied.). In deciding whether there is a disputed issue of material fact, every doubt must be resolved in favor of the nonmovant and evidence favorable to the nonmovant must be taken as true.

In reviewing a trial court's grant of Summary Judgment, the issue is whether the Movant has established that no genuine issue of material fact exists and the Movant is entitled to judgment as a matter of law. Tex.R.Civ.P. 166a(c); KPMG Peat Marwic'k v. Harrison County Housing Finance Corp., 988 S.W.2d 746,748 (Tex.1999). There is no evidence Respondent has asserted nor any facts which constitute a viable defense to Petitioner's claim and no such defenses exist. There are no contested issues of material fact. If the court views all the evidence favorable to the nonmoving party, the facts still remain that Respondent is liable, to Petitioner. All evidence has been presented and the Petitioner is entitled to Summary Judgment as a matter of law.

Based on all of the foregoing, Petitioner respectfully requests that this honorable court reach the same conclusions as the courts in the above referenced cases, and find that the trial court committed gross error, and abused its discretion when it denied Petitioner's Motion for Summary Judgment against Respondent.

It is Petitioner's position that there are several genuine issues of material facts in dispute, and as a result Respondent's motion should fail, and should have been denied by the trial Court in its entirety. The arguments propounded to by Respondent in its Motion for Summary Judgment takes a very narrow view of the law and all of the facts and circumstances surrounding this matter. Further, the local rules require a certificate of conference prior to Respondent filing its motion. This was not done in this case, and as a result Respondent failed to comply with the local rules of this district prior to filing its motion. Petitioner prays that this honorable Court adopt a much wider perspective than the one presented by Respondent in reaching a decision in this case.

In deciding whether there is a disputed issue of material fact, every doubt must be resolved in favor of the nonmovant and evidence favorable to the nonmovant must be taken as true. Respondent in its Brief has failed to present any credible evidence that it was not aware of the lawsuit filed against its insured. Further, Respondent has no evidence from its insured which would support its position that its insured failed to seek its assistance in the defense of the case filed with the State Court.

It is undisputed that on the date of the incident, HOUSTON STAR SECURITY PATROL, was insured by Respondent, NAUTILUS INSURANCE COMPANY, under policy number NN365860.

It is Petitioner's position that it is also undisputed that on the date of the incident made the basis for this cause of action, HOUSTON STAR SECURITY PATROL, had a policy with Respondent, and that the same was valid, in effect, and has not been cancelled.

It is also Petitioner's position that the specific provisions in the insurance policy that HOUSTON STAR SECURITY PATROL, had with Respondent provides that there was coverage for the incident of October 26, 2013, which makes Respondent liable and responsible for the payment of the Default judgment which Petitioner secured against HOUSTON STAR SECURITY PATROL.

In reviewing a trial court's grant of Summary Judgment, the issue is whether the Movant has established that no genuine issue of material fact exists and the Movant is entitled to judgment as a matter of law. Tex.R.Civ.P. I 66a(c); KPMG Peat Marwic'k v. Harrison County Housing Finance Corp., 988 S.W.2d 746,748 (Tex.1999). There is no evidence Respondent has asserted nor any facts which constitute a viable defense to Petitioner's claim and no such defenses exist. There are no contested issues of material fact. If the court views all the evidence favorable to the nonmoving party, the facts still remain that Respondent is liable, to Petitioner. All evidence has been presented and the Petitioner is entitled to Summary Judgment as a matter of law.

The insurance policy that Houston Star Security Patrol had with Respondent does not exclude coverage, for the incident made the basis of Petitioner's cause of action against Respondent and that Respondent filed its Petition for Declaratory Judgment only to cause Petitioner to incur additional costs, expense and attorney fees.

4. Whether Petitioner is entitled to recover its claim against Respondent, including its judgment plus pre, and post judgment interests, and attorney fees and costs?

Upon reviewing of this Petitioner's appeal, she requests that this honorable court make a specific finding that Respondent's Motion for Summary Judgment has no basis, and is without merit because Petitioner raised several issues of material facts in dispute.

That the insurance policy that Houston Star Security Patrol had with Respondent does not exclude coverage, for the incident made the basis of Petitioner's cause of action against Respondent and that Respondent filed its Petition for Declaratory Judgment only to cause Petitioner to incur additional costs, expense and attorney fees.

That Petitioner should be awarded her costs and attorney fees as judgment, and further have the same assesses against Respondent, all as provided in the Federal Rules of Civil and Appellate Procedure.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted.

Respectfully Submitted,

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